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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. ~~276~~ 40

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

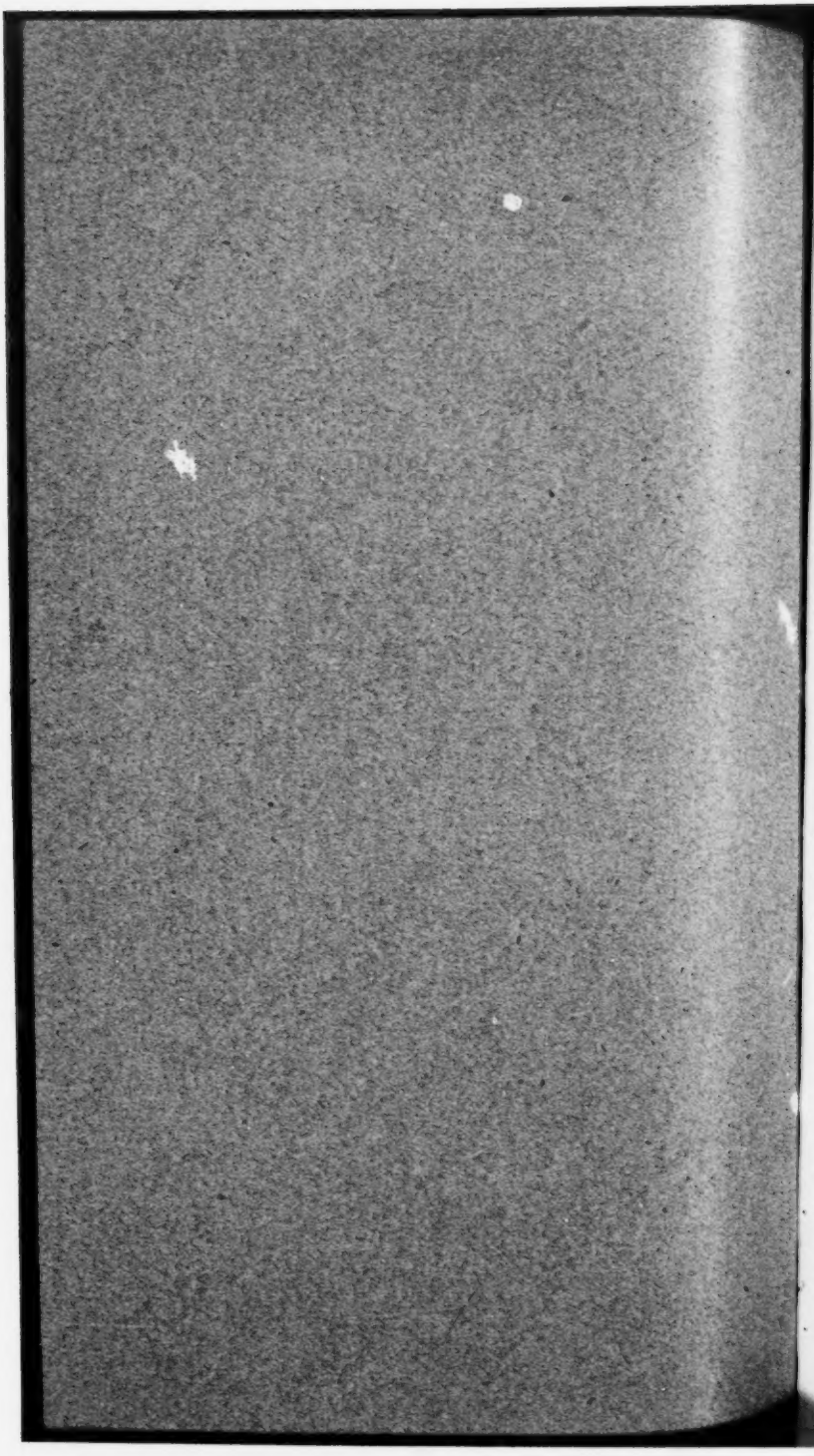
*vs.*

LUCY DIXON, ADMINISTRATRIX OF ALEXANDER DIXON, DECEASED; R. H. CHALKEY, AND WILLIAM SIDLES.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED APRIL 26, 1899.

(17,382.)



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COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 28th day of October, A. D. 1898.

Present: Chief Justice Lewis, Judges James H. Hazelrigg, Thos. H. Paynter, A. R. Burnam, B. L. D. Guffy, George Du Relle, and Jas. D. White.

CHESAPEAKE & OHIO RAILWAY CO., R. H. CHALKEY, and WILLIAM SIDLES, Appellants,
*vs.*
LUCY DIXON, Administratrix of Alexander Dixon, Dec'd, Appellee.

Be it remembered that heretofore, to wit, on September 1st, A. D. 1896, the appellants, by counsel, filed in the office of the clerk of the Kentucky court of appeals a transcript of a record in words and figures following, to wit:

1 STATE OF KENTUCKY, *County of Boyd*, } *sct:*

Boyd Circuit Court.

Pleas before the Honorable S. G. Kinner, judge of the Boyd circuit court, at the court-house thereof, in the city of Catlettsburg, Kentucky, on the 12th day of October, 1895, to wit:

LUCY DIXON, Adm'r'x of Alexander Dixon, Plaintiff,
*vs.*
THE CHESAPEAKE & OHIO RAILWAY COMPANY, R. H. CHALKEY, and Wm. Sidles, Defendants.

Be it remembered that on the 19th day of October, 1894, the above-named plaintiff produced and filed in the clerk's office of the Boyd circuit court *his* certain petition against the above-named defendants, which is clothed in words and figures as follows, to wit:

*Petition.*

Boyd Circuit Court.

LUCY DIXON, Adm'r'x of Alexander Dixon, Plaintiff,
*vs.*
THE CHESAPEAKE & OHIO RAILWAY COMPANY, R. H. CHALKEY, and Wm. Sidles, Defendants.

The plaintiff, Lucy Dixon, says that Alexander Dixon departed this life intestate on 22nd day of September, 1894, while a resident

of and domiciled in Boyd county, Kentucky; that by an
2 order of the Boyd county court made and entered on the — day of Sept., 1894, plaintiff was appointed administratrix of his estate, and gave bond and duly qualified and is now acting as the administratrix of the said estate. A copy of said order is filed herewith as part hereof, marked "A."

She says that the defendant The Chesapeake & Ohio Railway Company is and at the time hereinafter stated was a corporation and common carrier of freight and passengers for hire, and said defendant, — locomotives, cars, and other appurtenances, now operates and at the times hereinafter stated operated lines of railway extending into the county of Boyd and State of Kentucky. She says that on the 22nd day of September, 1894, while crossing the track of the defendant at the crossing of the Ashland and Catlettsburg Turnpike road and within the corporate limits of said town, the said intestate, Alexander Dixon, was by the negligence of the defendant The Chesapeake & Ohio Railway Company and of its agents and servants, R. H. Chalkey and Wm. Sidles, who were in charge thereof, run over and instantly killed by one of defendant's passenger trains while on its way from Catlettsburg to Ashland, Boyd county, Kentucky, whereby she has been damaged in the sum of thirty thousand dollars.

At the time and place when and where plaintiff'- intestate was injured, as aforesaid, the defendants R. H. Chalkey and Wm. Sidles were and — a long time theretofore had been servants of the corporate defendants, in charge and control of said train, and then and there were and — long time -heretofore had continuously been respectively engineer and fireman of said train, and said negligence of the corporate defendant was done by and through its said
3 servants and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants.

Wherefore plaintiff prays for a judgment against the defendants — $30,000, for her costs, and all proper relief.

SCOTT & DINKLE,
JOHN F. HAGER,
*Att'ys for Pl'ff.*

The exhibit marked "A," referred to in the foregoing petition, is clothed in words and figures as follows, to wit:

Boyd Circuit Court, September Special Term, 29th Day of Sept., 1894.

On motion of Lucy R. Dixon, widow of Alexander Dixon, deceased, she is hereby appointed administratrix of the estate of said Alexander Dixon, deceased; thereupon said Lucy R. Dixon, being in court, accepted the appointment and took the oath required by law and, together with A. C. Howell and H. S. Dixon, her sureties, entered into and acknowledged bond, conditioned as required by law; which bond is approved and accepted by the court; there-

upon the court grants letters of administration herein to her in due form of law.

A copy.
Attest: JOHN VOSE, *C. B. C. C.*

And upon the foregoing petition the following summons issued, to wit:

The Commonwealth of Kentucky to the sheriff of Boyd county:

You are hereby commanded to summon the Chesapeake & Ohio Railway Company, R. H. Chalkey, and Wm. Sidles to answer, on the first day of the next January term of the Boyd circuit court, a petition in ordinary filed against them in said court by Lucy Dixon, adm'r'x of Alexander Dixon, and warn them that upon failure to answer *or* they will be proceeded against for contempt; and you will make due return for this summons to the next January term of said court.

Given under my hand, as clerk of said court, this 19th day of October, 1894.

BEN. U. STEELE,
*Clerk B. C. C.*

4 Upon the back of said summons the following return appears, to wit:

Executed by delivering a copy of the within summons to R. H. Chalkey and a copy of the same to H. C. Hite, the nearest agent of the Chesapeake & Ohio railway to the court-house, on Nov. 13th, and a copy of the same to William Sidles on Nov. 16th, 1894.

JOHN O'KELLY, *S. B. C.*

And afterwards, to wit:

*Ordinary.*

Boyd Circuit Court, January Term, January 30th, 1895.

LUCY DIXON, Adm'r'x, Plaintiff,
*against*
C. & O. RAILWAY CO., Defendant.

The defendant produced and filed its petition herein and tendered therewith a bond, as required by law in such cases made and provided, and thereupon moved the court to transfer and remove this cause to the United States court for the district of Kentucky; which motion the court takes under advisement.

The petition and bond referred to in the foregoing order *is* clothed in words and figures as follows, to wit:

*Petition for Removal of this Cause to the United States Circuit Court for the District of Kentucky.*

Boyd Circuit Court.

LUCY DIXON, Administratrix of Alexander Dixon, Plaintiff,
*vs.*
CHESAPEAKE & OHIO RAILWAY CO. ET AL., Defendants.

5 To the honorable the circuit court of Boyd county, State of Ky.:

Your petitioner, Chesapeake & Ohio R'y Co., respectfully shows that it is one of the defendants in the above entitled suit, and that the matter and amount in dispute in the said suit, exclusive of interest and cost, exceeds the sum or value of $2,000.00.

Your petitioner further shows that the said suit is of a civil nature, and that there is in said suit a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, a controversy between your said petitioner, The Chesapeake & Ohio Railway Company, who avers that it was at the time of the bringing of this suit and still is a corporation created, organized, and existing under and by virtue of the laws of the State of Virginia and a citizen of the said State of Virginia, and the said plaintiff, Lucy Dixon, administratrix of Alexander Dixon, who, *was* your petitioner avers, was then and still is a citizen of the State of Kentucky; that the said controversy is of the following nature, viz:

Whether your petitioner is liable to the said plaintiff for damages on account of the death of the said intestate, alleged to have been caused by the negligence of certain of its servants therein named and made defendants thereto and other of its servants then and there in its employment and who are not named, it being claimed by said plaintiff that because thereof your petitioner is liable in damages to her, and that your petitioner and the said plaintiff are both actually interested in said controversy.

6 Your petitioner further states that the defendants R. H. Chalkey and William Sidles are neither necessary nor proper parties defendant to this cause, and that they were made parties defendant to this cause for the sole and single purpose to prevent a removal by petitioner of this cause to the circuit court of the United States for the district of Kentucky and thereby unlawfully to deprive your petitioner of the right conferred upon it by the Constitution and laws of the United States.

And your petitioner offers herewith a bond, with good and sufficient surety, for its entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto, and it prays this honorable court to proceed no further herein except to make the order of removal required by law

and to accept said surety and bond, to cause the record herein to be removed into said circuit court of the United States for the district of Kentucky; and he will ever pray.

WADSWORTH & COCHRAN,
*Att'ys for Petitioner.*

STATE OF KENTUCKY, }
*County of Boyd,* } *sct:*

I, W. H. Wadsworth, being duly sworn, do say that I am a member of the firm of Wadsworth & Cochran, the attorneys for the petitioner in the above-entitled cause; that I have read the fore-
7 going petition and know the contents thereof; that the statements and allegations therein contained are true as I verily believe.

W. H. WADSWORTH.

Subscribed by the said W. H. Wadsworth in my presence and by him sworn to before me this 30th day of January, A. D. 1895.

M. F. HAMPTON,
*D. C., Boyd Circuit Court.*

LUCY DIXON, Administratrix of Alexander Dixon, Plaintiff, }
*vs.* } Bond.
CHESAPEAKE & OHIO RAILWAY COMPANY ET AL., Defendants. }

Know all men by these presents that we, The Chesapeake & Ohio Railway Company, as principal, and W. H. Wadsworth and A. M. J. Cochran, as sureties, are hereby held and firmly bound unto Lucy Dixon, administratrix of Alexander Dixon, in the penal sum of one thousand dollars; for the payment thereof, well and truly to be made unto the said Lucy Dixon, administratrix of Alexander Dixon, her heirs and assigns, we bind ourselves, jointly and severally, firmly by these presents;

Yet upon these conditions: The said Chesapeake & Ohio Railway Company having petitioned the circuit court of Boyd county, State of Kentucky, for the removal of a certain cause therein pending, wherein Lucy Dixon, administratrix of Alexander Dixon, is plaintiff and The Chesapeake & Ohio Railway Company is defendant, — the circuit court of the United States in and for the district of Kentucky:

8 Now, if the said Chesapeake & Ohio Railway Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all cost that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 29th day of January, A. D. 1895.

THE CHESAPEAKE & OHIO RAILWAY CO.,
By A. M. J. COCHRAN. [SEAL.]
W. H. WADSWORTH. [SEAL.]
A. M. J. COCHRAN. [SEAL.]

STATE OF KENTUCKY, *Mason County,* } *sct:*

We, W. H. Wadsworth and A. M. J. Cochran, both of Mason county, in said State, the sureties in the foregoing bond, being duly sworn, do depose and say, each for himself, that we are residents of the State of Kentucky and property-holders therein, and that we are each of us worth the sum of one thousand dollars, over and above all our debts and liabilities and exclusive of property by law exempt from execution, and that each have property in the State of Kentucky liable to execution and of the value of more than one thousand dollars.

W. H. WADSWORTH.
A. M. J. COCHRAN.

9 Subscribed in my presence by W. H. Wadsworth and A. M. J. Cochran and by them sworn to before me this 29th day of Jan., A. D. 1895.

WM. D. COCHRAN,
*Clerk Mason County Court.*

And at another day, to wit:

Boyd Circuit Court.

LUCY DIXON, Administratrix, Plaintiff, *against* C. & O. RAILWAY CO., Defendant. } Ordinary.

This cause coming up on the motion of the defendant for a removal of this cause to the U. S. court for the district of Kentucky, upon its petition and bond already presented, and the court, being sufficiently advised, adjudges that the bond filed be approved; but the court, having fully considered the same, overruled the petition and motion of the defendant for a removal of this cause to the U. S. court for the district of Kentucky; and to this ruling and opinion of the court the defendant excepts.

It is ordered that this cause be continued generally. On motion of the defendant, 30 days is allowed it in which to file its answer to the petition herein.

And at another day, to wit:

Boyd Circuit Court, September Term, September 28th, 1895.

LUCY DIXON, Adm'r'x. Plaintiff,
*against*
C. & O. RAILWAY Co., Defendant. } Ordinary.

10 The plaintiff tendered and offered to file an amended petition herein; to the filing of which the defendant, by counsel, objects, and this cause is submitted to the court upon motion to file said amended petition of the plaintiff, together with the objection thereto.

And at another day, to wit:

Boyd Circuit Court, September Term, October 8th, 1895.

LUCY DIXON, Adm'x, Plaintiff,
*against*
C. & O. RAILWAY Co., &c., Defendants. } Ordinary.

On motion of the defendants, their answer filed in vacation is now noted of record as filed.

On motion of the plaintiff, her amended petition, tendered on a former day of the present term, is now withdrawn.

The plaintiff filed reply to the answer of defendant C. & O. Railway Co.

The plaintiff filed reply to the answer of the defendants R. H. Chalkey, &c., herein.

The parties appeared by their attorneys, and thereupon came a jury, to wit, John Lambert, J. H. Crow, Frank Brown, J. J. Emerick, A. Wolfe, Ben. Sweet, Jas. L. Harris, Jas. W. Butler, J. S. Mitchell, W. R. Holmes, T. L. Ford, and J. D. Mayhew, who were duly sworn to try the issue joined, and, having heard the evidence in part, it was announced by the court that there was not sufficient time to progress further with the trial hereof this day. The jury are therefore allowed to separate and, with the admonition prescribed
11 by law, they are adjourned until 8½ o'clock tomorrow morning.

The answers filed March 20th, 1895, referred to in the foregoing order, are clothed in words and figures as follows, to wit:

*Answer of C. & O. Railway Co.*

Boyd Circuit Court.

LUCY DIXON, Adm'x, &c., Plaintiff,
*vs.*
THE C. & O. RAILWAY Co., Defendant. } Answer.

The defendant, The C. & O. Railway Company, comes and for answer to the plaintiff's petition denies that plaintiff's intestate was run over and killed by one of its passenger trains by the negli-

gence of the defendant or its codefendants or either of them. It denies that it was guilty of negligence on the occasion alleged, or that its negligence was done by or through any of its servants, or that any such negligence was the joint negligence of all defendants.

Par. 2. For further defense it states that at the time and place alleged the plaintiff's intestate was negligently and carelessly attempting to cross defendant C. & O.'s railroad track, that said negligence contributed to the injury complained of, and that if it had not been for the said negligence of plaintiff's intestate the said injury would not have been received.

F. T. D. WALLACE,
WADSWORTH & COCHRAN,
*Att'ys for Defendant.*

12 *Answer of Chalkey & Sidles.*

Boyd Circuit Court.

LUCY DIXON, Adm'x, &c., Plaintiff,
*vs.*
THE CHESAPEAKE & OHIO RAILWAY CO., &c., Defendant.
} Answer of Chalkey & Sidles.

The defendants R. H. Chalkey and Wm. Sidles come and for answer to the plaintiff's petition deny that plaintiff's intestate was run over and killed by one of their codefendant's passenger trains by the negligence of their defendant or their codefendant or either of them. They deny that they or either of them were guilty of negligence on the occasion alleged, or that the negligence was done by or through any of their codefendants' servants, or that any such negligence was the joint negligence of all defendants.

Par. 2. For further defense, they state that at the time and place alleged the plaintiff's intestate negligently and carelessly attempted to cross defendant's C. & O. railroad track; that said negligence contributed to the injury complained of, in that if it had not been for the said negligence of plaintiff's intestate the said injury would not have been received.

Wherefore they pray to be hence dismissed and for costs, &c.

F. T. D. WALLACE,
WADSWORTH & COCHRAN,
*For Defendants.*

13 The reply to answer of the C. & O. R'y Co., referred to in the foregoing order, is clothed in words and figures as follows, to wit:

Boyd Circuit Court.

LUCY DIXON, Adm'r'x, Plaintiff,
*vs.*
CHESAPEAKE & OHIO RAILWAY COMPANY, &C., Defendants.
} Reply.

For reply to answer of defendant C. & O. R'y Co., plaintiff denies that at the time and place alleged in the petition the plaintiff's in-

testate negligently or carelessly attempted to cross defendant C. & O. R'y Company's track, or that by said or any negligence or that in attempting to cross said track at the time and place in question plaintiff's intestate contributed to the injury complained of, or that by any negligence of the plaintiff's intestate he received the injury complained of in the petition, or that but for any or said negligence of plaintiff's intestate said injury would not have been received.

Wherefore she prays as in her petition and for all proper relief.

SCOTT & DINKLE AND
JOHN F. HAGER, *P. Q.*

The reply to answer of Chalkey & Sidles, referred to in the foregoing order, is clothed in words and figures as follows, to wit:

Boyd Circuit Court.

LUCY DIXON, Adm'r'x, Plaintiff,
*vs.*
CHESAPEAKE & OHIO RAILWAY COMPANY, &C., Defendants.

14 For reply to answer of defendants R. H. Chalkey and Wm. Sidles, plaintiff denies that at the time and place alleged in the petition the plaintiff's intestate negligently or carelessly attempted to cross defendant C. & O. R'y Company's track, or that by — said railroad track at the time and place in question plaintiff's intestate contributed to the injury complained of, or that by any negligence of the plaintiff's intestate he received the injury complained of in the petition, or that but for any negligence of plaintiff's intestate said injury would not have been received.

Wherefore she prays as in her petition and for all proper relief.

SCOTT AND DINKLE AND
JOHN F. HAGER, *P. Q.*

And at another day, to wit:

Boyd Circuit Court, September Term, October 9th, 1895.

LUCY DIXON, Adm'r'x, Plaintiff,
*vs.*
C. & O. RAILWAY CO., Defendant. } Ordinary.

The jury empaneled and sworn in this cause on yesterday met pursuant to adjournment, and the trial of this cause is now resumed. At the conclusion of the testimony offered by both parties, by consent it is ordered that the jury be conducted in a body by Wm. Kline, sheriff of Boyd county, to the place where the injury or death occurred which is the subject of litigation in this action, which by consent shall be shown to them by J. J. Emerick, one of the jurors in this action, the jury being admonished while
15 thus absent that no person other than the said Emerick should speak to them upon any subject connected with this trial.

The jury, having had a view of the place aforesaid, reconvened in court, and it being announced by the court that there was not sufficient time to complete this trial this day, the jury are allowed to separate, and, with the admonition prescribed by law, they are adjourned until 9 o'clock tomorrow morning.

And at another day, to wit:

Boyd Circuit Court, September Term, October 10th, 1895.

Lucy Dixon, Adm'r'x, Plaintiff,
*vs.*
C. & O. Railway Co., &c., Defendants. } Ordinary.

The jury empaneled and sworn in this cause met pursuant to adjournment, and the trial *of* hereof is now resumed.

The plaintiff tendered and offered to file an amended petition herein; to the filing of which the defendants objected; which objection being heard *are* sustained, the court refusing to allow said amended petition to be filed; to which plaintiff excepts.

The jury having heard all the evidence, the instructions of the court, and arguments of counsel, it was announced by the court that there was not sufficient time—this day—to complete the trial; the jury are therefore allowed to separate, and, with the admonition prescribed by law, are adjourned until 9 o'clock tomorrow morning.

16 And at another day, to wit:

Boyd Circuit Court, September Term, October 11th, 1895.

Lucy Dixon, Adm'r'x, Plaintiff,
*vs.*
C. & O. Railway Company, Defendant. } Ordinary.

The jury empaneled and sworn in this cause met pursuant to adjournment, and, having heard all the evidence, instructions of the court, and arguments of counsel in this cause, retired to their room to consider of a verdict; but not returning one, though confined to their room the whole of the day, they returned into court and are allowed to separate, and, with the admonition prescribed by law, are adjourned until 8½ o'clock tomorrow morning.

And at another day, to wit:

Boyd Circuit Court, September Term, October 12th, 1895.

Lucy Dixon, Adm'r'x, Plaintiff,
*vs.*
C. & O. Railway Company, &c., Defendants. } Judgment.

This day came the parties, by their attorneys, and the jury empaneled and sworn in this cause met pursuant to adjournment and retired to their room, and awhile returned the following verdict, to wit:

"We, the jury, agree and find for the plaintiff, and assess the damages at ten thousand dollars ($10,000).

J. J. EMERICK,
BEN. SWEET,
J. D. MAYHEW,
17 FRANK BROWN,
T. L. FORD,
JOHN LAMBERT,
J. H. CROW,
JAS. L. HARRIS, AND
JAS. W. BUTLER."

Wherefore it is adjudged by the court that the plaintiff, Lucy Dixon, administratrix of the estate of Alexander Dixon, deceased, recover against the defendants, The Chesapeake and Ohio Railway Company and R. H. Chalkey and Wm. Sidles, the sum of ten thousand dollars ($10,000) in damages, with interest thereon from this the 12th day of October, 1895, until paid, and her costs herein expended.

Ordered that the fees of the clerk be endorsed to his use. The defendants filed grounds, and thereupon moved the court for a new trial herein, and this cause is submitted upon said motion.

The motion and grounds for a new trial referred to in the foregoing order are clothed in words and figures as follows, to wit:

Boyd Circuit Court.

| | |
|---|---|
| LUCY DIXON, Adm'r'x, &c., Plaintiff,<br>*vs.*<br>THE CHESAPEAKE & OHIO RAILWAY COMPANY,<br>Defendant. | Motion & Grounds for New Trial. |

Now comes defendants, jointly and severally, and move the court to set aside the verdict and judgment herein and to grant a new trial herein for the following reasons, to wit:

1. The court erred to the prejudice of defendants and of each of them in refusing to admit competent evidence offered by defendants.

18 2. The court erred to the prejudice of defendants and each of them in admitting incompetent evidence offered by the plaintiff and objected to by defendant.

3. The court erred to the prejudice of defendants and each of them in overruling defendants' motion to instruct the jury to find for defendants as in case of nonsuit, made at the close of the plaintiff's evidence.

4. The court erred to the prejudice of defendants and each of them in giving to the jury instructions No. 1, in typewriting, offered by plaintiff.

5. The court erred to the prejudice of defendants and each of them in giving to the jury instruction No. 2, in typewriting, offered it by plaintiff.

6. The court erred to the prejudice of defendants and each of them in giving to the jury instruction No. 3, in typewriting, offered by plaintiff.

7. The court erred to the prejudice of defendant- and each of them in giving to the jury instruction No. 4, in typewriting, offered by plaintiff.

8. The court erred to the prejudice of defendant- and each of them in giving to the jury instruction No. 5, in typewriting, on its own motion.

9. The court erred to the prejudice of the defendant- and each of them in giving to the jury instruction No. 6, in typewriting, on its own motion.

10. The court erred to the prejudice of defendants and each of them in giving to the jury instruction No. 7, in typewriting, on its own motion.

19 11. The court erred to the prejudice of defendants and each of them in giving to the jury instruction No. 8, in typewriting, offered by plaintiff.

12. The court erred to the prejudice of defendants and each of them in giving to the jury instruction No. 9, in typewriting, offered by plaintiff.

13. The court erred to the prejudice of defendants and each of them in giving to the jury instruction No. 11, in handwriting of John F. Hager, Esq.

14. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "A," in handwriting of W. H. Wadsworth, Esq., asked for by defendants.

15. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "B," in handwriting of A. M. J. Cochran, asked for by defendants.

16. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "C," in handwriting of W. H. Wadsworth, asked for by defendants.

17. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "D," in handwriting of W. H. Wadsworth, asked for by defendants.

18. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "E," in handwriting of W. H. Wadsworth, asked for by defendants.

20 19. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "F," in handwriting of W. H. Wadsworth, asked for by defendants.

20. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "H," in handwriting of A. M. J. Cochran, asked for by defendants.

21. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury instruction marked "I," in handwriting of W. H. Wadsworth, asked for by defendants.

22. The court erred to the prejudice of defendants and of each of them in refusing to give to the jury — marked "J," in the handwriting of W. H. Wadsworth, asked for by defendants, being all of

said instructions in handwriting of said Wadsworth without modification made by the judge in his handwriting.

23. Because of excessive damages, appearing to have been given under influence of passion or prejudice.

24. Because of error in assessment of amount of recovery, it being too large.

25. The verdict is not sustained by sufficient evidence and is contrary to law.

26. Because of error of law occur-ing at the trial and excepted to by defendant.

F. T. D. WALLACE,
WADSWORTH & COCHRAN,
*Att'ys for Defendants.*

21 And at another day, to wit:

Boyd Circuit Court, September Term, October 14, 1895.

LUCY DIXON, Adm'r'x, Plaintiff,
*vs.*
C. & O. RAILWAY Co., &c., Defendants. } Ordinary.

The motion and grounds for a new trial filed herein by defendants, being now heard, are overruled; to which ruling of the court the defendants except.

On motion of defendants, time until the 10th day of the next regular term is given to prepare and file their bill of exceptions herein, and when filed to have same effect as though filed at this term.

And at another day, to wit:

Boyd Circuit Court, January Term, February 5th, 1896.

LUCY DIXON, Adm'r'x,
*against*
C. & O. RAILWAY Co. } (Ordinary.)

The defendant in each of the foregoing causes, six in number, tendered and offered to file bills of exception in each of said causes, which are passed to counsel for examination.

And at another day, to wit:

Boyd Circuit Court, January Term, February 12th, 1896.

22 LUCY DIXON, Adm'r'x. Plaintiff,
*vs.*
C. & O. RAILWAY COMPANY, Defendant. } Ordinary.

The examination of the bill of exceptions tendered by the defendants on a former day of the present term having been completed, the same is now signed and sealed by the circuit judge, filed, and ordered to be made a part of the record of this cause.

(The bill of exceptions is omitted.)

STATE OF KENTUCKY, *County of Boyd,* } *sct:*

I, G. H. Meade, clerk of the Boyd circuit court, in the State of Kentucky, do certify that the foregoing and annexed 203 pages and 5 lines contain a full, true, and complete transcript of the record and proceedings had in said court in the cause therein named, wherein Lucy Dixon, adm'r'x of the estate of Alexander Dixon, deceased, is plaintiff and Chesapeake & Ohio Railway Company, R. H. Chalkey, and William Sidles are defendants, with the omissions and exceptions stated by the clerk on page 204 of this record, and the same is as appears to me among the records and papers on file in this cause and proceedings therein.

Given under my hand this 26th day of May, 1896.

G. H. MEADE,
*Clerk Boyd Circuit Court,*
By W. C. McCLINTOCK, *D. C.*

23 Kentucky Court of Appeals.

CHESAPEAKE & OHIO RAILWAY COMPANY, R. H. CHALKEY, and William Sidles, Appellants,
*vs.*
LUCY DIXON, Administratrix of Alexander Dixon, Appellee.

Now come the appellants, The Chesapeake & Ohio Railway Company, R. H. Chalkey, and William Sidles, and jointly and severally appeal from judgment hereinafter referred to and make the following statements in accordance with section 739 of the civil code, to wit:

First. Names of the appellants are Chesapeake & Ohio Railway Company, R. H. Chalkey, and William Sidles.

Second. The name of the appellee is Lucy Dixon, administratrix of Alexander Dixon.

Third. The judgment appealed from was rendered on the 12th day of October, 1895, at the September term, 1895, of the Boyd circuit court, and may be found upon page 16 of the transcript.

Fourth. A summons is desired, directed to the sheriff of Boyd county, against the appellee.

WADSWORTH & COCHRAN,
*Attorneys for Appellants.*

24 Upon the 1st day of September, 1896, the appeal was granted by the clerk of this court pursuant to said statement and at request of appellant's attorney, and thereupon appellants executed the following supersedeas bond, viz:

Court of Appeals of Kentucky.

CHESAPEAKE & OHIO RAILWAY CO., Appellant,
*vs.*
LUCY DIXON, Adm'r'x of Alexander Dixon, Appellee.
} Supersedeas Bond.

Whereas said appellant has taken an appeal from a judgment of the Boyd circuit court, rendered at its September term, 1895, against *them* in favor of the appellee, for the sum of ten thousand dollars ($10,000), with interest thereon from 12th day of October, 1895, and costs, and the appellant desires to supersede said judgment:

Now, we, —— ——, principal, and W. H. Wadsworth and A. M. J. Cochran, securities, covenant to and agree with the appellee, Lucy Dixon, adm'r'x of Alexander Dixon, that the appellant will pay to the appellee all costs and demands that may be adjudged against the appellant on the appeal, and also that *they* will satisfy and perform the said judgment in case it shall be affirmed or any judgment or order which the court may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid, and also pay all rents, hire, or damage which, during the pendency of the appeal, may accrue on any of the property of which the appellee is kept out of possession by reason of the appeal.

Witness our hands this 1st day of Sept., 1896.

W. H. WADSWORTH,
By A. ADDAMS,
*Attorney-in-fact.*
A. M. J. COCHRAN,
By A. ADDAMS,
*Attorney-in-fact.*

Attest: A. ADDAMS, *C. C. A.*

Kentucky Court of Appeals.

CHESAPEAKE & OHIO RAILWAY CO. ET AL.,
Appellants,
*vs.*
LUCY DIXON, Adm'r'x of Alexander Dixon,
Appellee.
} Power of Attorney.

Know all men by these presents that we, W. H. Wadsworth and A. M. J. Cochran, do hereby authorize and empower A. Addams, clerk of the court of appeals, to subscribe our names as sureties of the Chesapeake & Ohio Railway Company to an appeal bond to be executed by said company upon an appeal about to be taken by it from a judgment of the Boyd circuit court rendered at its September term, 1895, in favor of Lucy Dixon, administratrix of Alexander Dixon, for the sum of $10,000, interest and cost.

Signed this first day of September, 1896.

W. H. WADSWORTH.
A. M. J. COCHRAN.

Subscribed and acknowledged before me by W. H. Wadsworth and A. M. J. Cochran this first day of September, 1896. I certify that said named persons are good for the amount of the judgment specified in the foregoing power of attorney.

WILLIAM D. COCHRAN,
*Clerk Mason County Court.*

26 At a court of appeals held in and for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 27th day of October, 1896, the following order was entered:

"CHESAPEAKE & OHIO RAILWAY Co., &c., Appellants,
*v.*
ALEXANDER DIXON'S ADM'X, Appellee.

Came the appellee, by counsel, and entered his appearance herein, and the cause is continued."

Afterwards, on the 10th day of November, 1896, the following order was entered of record herein:

"On motion of appellee, by counsel, the order of continuance herein is set aside and the cause is passed for briefs."

Afterwards, on the 12th day of December, 1896, the following order was entered of record herein:

"Ordered that this cause be continued."

Afterwards, on the 18th day of February, 1897, the following order was entered of record herein:

"The appellant moved the court for an oral argument herein; to which appellee objects.

"The appellee filed grounds and moved to submit this cause, and said motions are submitted."

The following are the grounds filed by the foregoing order:

"Kentucky Court of Appeals.

CHESAPEAKE & OHIO R'y Co., Appellant,
*v.*
DIXON'S ADM'X, Appellee. } Statement.

27 The record in this case was filed on the 1st day of Sept., 1896, and instead of sending summons upon the appeal to the sheriff of Boyd county for service, counsel for appellant took the summons and kept it till it was too late to serve it in time for the Sept. term.

The case was docketed, but continued. Counsel for appellee appeared and entered the appearance of appellee and made statement as above, and moved the court to set aside the order of continuance, which was done.

On Nov. 10th the case was called and passed for briefs, and no

briefs having been filed, on Dec. 12th the case was again called and continued. No brief from appellee was due until appellant's was filed. The brief for appellant was filed on Jan. 29th, 1897, and it now moves the court to continue the case for oral argument.

Unless the day on which the brief was filed is counted, it was not filed 20 days before the calling of the case for hearing, as required by rule 3.

Counsel for appellee has been anxious to get the record, but has been unable to do so, and is informed by the clerk that counsel for appellants have had it for more than 20 days last past, thus preventing counsel for appellee from preparing a brief or making any motion in the case upon the calling of the same today.

The record is now in the hands of the counsel for the appellant.

I therefore seriously object to any further continuance of this case, and ask that the appeal be dismissed with damages, or, if that is not done, that it be submitted with leave to file a brief when the record is returned.

28 February 18th, 1897.

J. A. SCOTT,
*Att'y for Appellee.*"

Afterwards, on the 19th day of February, 1897, the following order was entered of record herein:

"The court being sufficiently advised, the motion to submit this cause is sustained and the cause is now submitted."

Afterwards, on the 28th day of October, 1898, the following judgment was entered of record herein—

Chief Justice J. H. Lewis, Justices J. H. Hazelrigg, T. H. Paynter, A. R. Burnam, B. L. D. Guffy, George De Relle, and J. D. White sitting:

| | |
|---|---|
| "CHESAPEAKE & OHIO RAILWAY COMPANY, &c., Appellants, *v.* ALEXANDER DIXON'S ADM'X, Appellee. | Appeal from the Boyd Circuit Court. |

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that appellee recover of appellants ten per cent. damages on the amount of the judgment superseded herein, which is ordered to be certified to said court.

It is further considered that appellee recover of appellants *his* cost expended herein."

On the same day the court, through Chief Justice Lewis, delivered the following opinion herein:

This action was brought by Lucy Dixon, administratrix of Alexander Dixon, against the Chesapeake and Ohio R. R.
29 Co., owner, and R. H. Chalky and Wm. Sidles, engineer and fireman, of a railroad train, by collision with which plaintiff's intestate was killed.

The killing occurred on the crossing of the Chesapeake and Ohio R. R. leading from Catlettsburg to Ashland by a turnpike road extending from one to the other of the two cities and being the only public highway from Catlettsburg to Ashland. The place of said crossing is within the corporate limits of Catlettsburg, and very much used by persons in vehicles and on foot, the proof showing that as many as 500 or more persons cross there each day. Parallel to and about 8 feet from the Chesapeake and Ohio R. R. track is the track of the O. & B. S. railroad, likewise crossed by the same highway.

The evidence shows that at the time of the occurrence the deceased, Alexander Dixon, who was about 70 years of age, was going on foot from Catlettsburg westward to his home, near Ashland.

The train which killed him, being a passenger train, was going in the same direction.

According to the evidence of eyewitnesses, he had crossed the track of the O. B. S. R. R. and was near to and about to or had put his foot upon the track of the Chesapeake & Ohio R. R., when, his attention being apparently attracted, he looked up the track towards Catlettsburg, but seeing nothing, nor being able to see any object on the track at a greater distance than 6 or 700 feet, on account of a curve in the track and intervening houses, he turned and looked westward along the track, about which time he was struck by the train.

30 The train *which* was 15 minutes late and running, according to the testimony of the engineer, 15 to 20 miles, and according to the testimony of others between 30 and 40 miles, per hour. He was struck with such force as to knock his body 8 or ten feet in the air and drive it bounding 73 feet, measured. According to the testimony of the engineer, when he first discovered him, Dixon was between the track of the Chesapeake & Ohio R. R. and O. B. & S. R. R.; that he immediately gave the alarm signal by short, sharp blasts of the whistle and put the air brake on, and immediately Dixon looked in the direction of the approaching train; whereupon he released the air brakes, supposing Dixon would get out of danger; but other witnesses testify that the air brake was not put on until after Dixon was struck.

The engineer and trainmen testify that a signal by blowing the whistle of the approach of the train to the crossing was made at the usual place, and they were corroborated by others not connected with the train, while others, who were near to the whistling post and whose attention was given to the passing train, testify that there was no whistle until the train had approached very near to the crossing, when there were several sharp blasts of the whistle in quick succession.

There is evidence tending to show and from which the jury could reasonably find that those in charge of the train were guilty of negligence in two respects—first, in failing to give proper signal of the approach to the crossing; second, considering that the crossing was within the limits of a city, the fact of the great number of

31 people usually crossing at that place on vehicles and on foot and the short distance the track could be seen therefrom

looking eastward, it was a high degree of negligence to move the train when near the crossing at even the rate of speed admitted by the engineer it was running.

We will now consider the various grounds relied on by appellants for reversing the judgment.

It is contended that the verdict, which was $10,000, is excessive, and in that connection instruction number 4 is objected to, being as follows: "If the jury find for the plaintiff they shall assess such damages as will, in the opinion of the jury, reasonably compensate plaintiff for the loss sustained by the death of plaintiff's intestate, not exceeding $30,000, and in fixing the amount of such compensation the jury may take into consideration the power of the deceased to earn money."

This court has not heretofore considered itself authorized to interfere with the verdicts of juries on account of excessive damages assessed, unless they appear to have been given under the influence of passion or prejudice.

And, compared with other cases that have been heretofore passed on by this court, we cannot say the assessment in this case was excessive.

The instruction complained of, in our opinion, did not, nor could, mislead the jury or prejudice, nor, as argued by counsel, is it liable — the same objection made to an instruction in the case of the Ky. Central R. R. Co. *vs.* Gastineau, 83 Ky., 123. The court did not err to the prejudice of appellant in permitting evidence to go to
32 the jury that there was no flagman at the crossing where the accident occurred.

For though that crossing is, according to the evidence, such an one as to require a flagman, the jury was not instructed in regard thereto.

The argument of counsel that the evidence was, according to the rule confining a recovery to the particular acts of negligence charged, incompetent, is not well founded, because there are no specific acts of negligence charged in the petition of appellee. The main ground for reversal is the refusal of the lower court to sustain the petition of appellant Chesapeake & Ohio R. R. Co. for a transfer of this case to the United States court for the district of Kentucky.

The ground upon which the transfer was sought, as alleged in the petition asking it, is that the action is wholly between citizens of different States, the Chesapeake & Ohio R. R. Co. being a corporation created under the laws of the State of Virginia and a citizen thereof, while appellee, Lucy Dixon, is and was a citizen of the State of Kentucky. As appellants Chalkey and Sidles were, when this action was commenced, citizens of Kentucky, the Boyd circuit court had jurisdiction of the persons of all the defendants, as well as of the subject of the action, if the defendants were jointly guilty of the negligence alleged to have been the cause of the death of Alexander Dixon, and jointly liable therefor.

It is alleged by appellee in her petition and, so far from
33 the contrary being shown by appellant the Chesapeake & Ohio R. R. Co., is clearly proved by the evidence in this case,

that appellants Chalkey and Sidles, as engineer and fireman of said train, were guilty of the negligence causing said death, and that the Chesapeake & Ohio R. R. Co., through its said employees, was also guilty of said negligence, and therefore they were jointly liable for the destruction of the life of said Dixon caused thereby.

It is not material that, as alleged in the petition for a transfer of this case, Chalkey and Sidles were made parties defendant for the single purpose of preventing the removal of the case by the Chesapeake & Ohio R. R. Co. to the circuit court of the U. S. for the district of Kentucky, or what may have been the motive of the plaintiff for bringing a joint action, unless they were wrongfully and illegally joined, and such is the doctrine as settled by the Supreme Court of the United States.

As, therefore, appellant Chesapeake & Ohio R. R. Co. neither sufficiently alleged nor attempted to prove that the defendants were wrongfully joined as such, the lower court properly refused to make the transfer.

Judgment is affirmed.

Afterwards, on the 25th day of November, 1898, the following order was entered herein:

"Came the appellant, by counsel, and filed an affidavit and moved the court to extend the time thirty days for filing a petition
34 for rehearing herein; to which motion the appellee, by counsel, filed written objections, and the cause is submitted on the motion."

The following is the affidavit filed by the foregoing order:

Kentucky Court of Appeals.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
*vs.*
LUCY DIXON, Adm'r'x, &c., Appellee.

Affiant, A. M. J. Cochran, states that he is appellant's attorney in this case; that since the decision of this case by this court he has been constantly engaged in writing briefs for cases set on the docket for this present September term and in preparing for the present November term of the Mason circuit court; that he has been so occupied with these matters that it has been impossible for him to prepare a petition for rehearing in this case. He states that the Mason circuit court is now in session and will be for four weeks, and that the December term of the U. S. circuit court at Covington begins Monday week; that he has cases in both courts that will occupy him pretty constantly, and that he needs an extension of thirty (30) days in which properly to prepare a petition for rehearing herein. He states that this application is not made for delay, but in order that he may have time within which to prepare a petition for rehearing. He states also that his co-counsel, W. H. Wadsworth, has also been busily engaged since the decision of this case;

that he has been unable to attend to this matter, and, further,
35 that the preparation of the petition for rehearing has been assigned to him in the division of the work between him and his co-counsel. He asks on behalf of his client that the time within which a petition for rehearing may be filed by it may be extended thirty (30) days.

A. M. J. COCHRAN.

Sworn to before me by A. M. J. Cochran this November 23, 1898.

MARY O'MEARA,
*Examiner for Mason County.*

Following is written objections filed by foregoing order:

Kentucky Court of Appeals.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
*vs.*
LUCY DIXON, Adm'r'x, Appellee.
} Counter-statement.

In behalf of my client, who has already been too long delayed, I most seriously object to any further delay in this case.

I like to be accommodating, and the records of this court will show that I have been liberal in agreements for the accommodation of counsel for appellant in all of these cases, but unless sickness or unavoidable absence prevents, I do not think that the time deemed necessary by the legislature in all cases (30 days) ought to be extended, and I believe that the court in construing rule fifteen ought to announce this rule, or rather construction, in furtherance of justice.

36 Mere press of business ought never to be a reason for delay, and the announcement of such a rule would not, in my judgment, promote justice; for good lawyers are always busy, and railroad attorneys especially, and they can always truthfully make the affidavit made in this case and thus nullify the rule.

I submit that the facts stated in the affidavit for an extension do not, in the language of rule fifteen, "state sufficient cause therefor."

Respectfully submitted.

JAS. ANDREW SCOTT,
*Attorney for Appellee.*

Afterwards, on the 26th day of November, 1898, the following order was entered herein:

"The court being sufficiently advised, the motion of appellant in this case for an extension of thirty days' time to file a petition for rehearing is overruled, and the time is extended fifteen days to file a petition for rehearing."

Afterwards, on the 2nd day of January, 1899, the following order was entered herein:

"Came appellant, by counsel, and filed a petition and moved the

court to grant a rehearing herein, and the cause is submitted on said petition."

Said petition referred to in above order is as follows:

37 Kentucky Court of Appeals.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant, *vs.* ALEXANDER DIXON'S ADMINISTRATRIX, Appellee. } Petition for Rehearing.

May it please the court:

The appellant respectfully moves the court for a rehearing of this cause and earnestly insists that the case should be reversed for the following reasons:

1. The court below gave to the jury the following instruction:

"If the jury find for the plaintiff they shall assess such damages as will, in the opinion of the jury, reasonably compensate the plaintiff for the loss sustained by the death of plaintiff's intestate, not exceeding thirty thousand dollars, and in fixing the amount of such compensation the jury may take into consideration the power of deceased to earn money."

In the case of Kentucky Central Railroad Company *vs.* Gastineau's Adm'r, 83 Ky., page 128, a similar instruction was held to be erroneous. We quote it:

"Compensatory damages are such as will, in the opinion of the jury, compensate plaintiff as administrator for his intestate's life, and in fixing the amount of compensatory damages the jury can inquire as to the value of the decedent's power to earn money had he not been killed."

38 This court, in the opinion of October 28, 1898, in affirming the judgment below and referring to this ground for reversal, said:

"The instruction complained of, in our opinion, did not, nor could, mislead the jury or prejudice, nor, as urged by counsel, is it liable to the same objection made to an instruction in the case of the Kentucky Central Railroad Company *vs.* Gastineau, 83 Ky., 123."

The court draws no distinction between the two instructions, which are identical in their meaning, and, we presume, bases its conclusion upon the idea that there was a difference in the two cases as to the cause of action. The court seems to proceed upon the idea that this suit was for gross negligence, and that punitive damages might have been awarded, and therefore the instruction in this case could not be misleading. If this is so, there has been a misconception upon the part of the court as to the cause of action in this case.

This suit was brought pursuant to sec. 6, Ky. Statutes, or the act of July 3rd, 1893, and seeks only to recover for ordinary negligence and not for gross negligence, and a reference to the petition so

shows. It was, therefore, a suit for compensation only, and the instructions offered by plaintiff below clearly show this.

But the Gastineau case was a case in which punitive damages were involved, as well as compensatory damages, and this case is the stronger upon that account.

39 The instruction should therefore have been limited to the power of decedent to earn money, and, as said by Judge Holt, "the jury not permitted, as they may well have supposed from this instruction they could, to fix some speculative value to compensate plaintiff as administrator for his intestate's life;" and the verdict of $10,000 for the life of a man 72 years old, with no earning capacity shown, shows the jury did this very thing.

If, then, the inquiry should have been limited to the power of the decedent to earn money in the Gastineau case, it should, unless the Gastineau case is overruled, be limited in the case at bar to the power of the deceased to earn money. If the cases are fairly identical and the instruction is fairly identical, then the law should be administered alike to all, and the law in Gastineau should be the law in Dixon, otherwise the defendant in this case is deprived of the equal protection of the law, as guaranteed by the section 1 of article 14 of the Constitution of the United States.

2. Appellant insists that, this being a cause of action for compensation only, the verdict for $10,000 was excessive, and evidently given under a misconception of the law or under the influence of passion and prejudice.

The rule, as we understand it, is that when the damages are at large or entirely in the discretion of the jury, this court will not set aside the verdict unless it is so flagrantly excessive as to

40 at first blush shock the conscience of the court; but we do not understand that this is the rule where it is a question of compensation only, when the damages are and can be measured by well-defined rules of law. See Graham and Watterman on New Trials, vol. 3, pp. 1133, 1143, 1153, 1167; also L. & N. R. R. Co. *vs.* Fox, 11 Bush., page 495. The court in this case says:

"It is insisted, however, by counsel for the appellee that the rule of law is that in actions for personal injuries the amount of the finding is in the sound discretion of the jury, and that the court cannot pronounce their finding excessive unless it be so great as appears at first blush to be outrageous and to indicate passion or partiality in the jury." * * * "There is a large number of cases in which the language quoted, or language similar in import, has been used by this court; but in nearly if not all of the cases in which such language has been used the plaintiff was not only entitled to recover compensation, but was likewise entitled to such additional sum, by way of punishing the defendant, as the jury might deem right under all the facts and circumstances in evidence before them. Whether that rule should still be applied in that class of cases we need not decide, for in this case both parties, as we have already said, concurred in having the jury told to limit their finding to compensatory damages." * * * And again: "We concede that courts of all grades should exercise extreme caution in inter-

fering with the verdict of juries, and that an appellate court
41 should hesitate not only because of the delicacy of undertaking to set aside the finding of the constitutional triers of fact, but because of the concurrence with the jury of the judge presiding at the trial.

But if, after giving due weight to the verdict of the jury and the approval of the circuit judge, this court is clearly convinced, in a case in which the plaintiff is only entitled to recover compensatory damages, that the jury has gone beyond compensation and inflicted punishment on the defendant under the influence of passion or prejudice, it is bound *to* the weightiest considerations of duty to direct a new trial. To refuse to do so is to abandon the defendant to the arbitrary will of the jury. The supervising control of the courts, both of original and appellate jurisdiction, is, in this country, an integral part of the jury system, and as indispensable to the right administration of justice as the panel of twelve men."

The administratrix of Dixon was entitled to recover the loss to the estate by the death of the decedent, so far as his power to earn money was concerned. It was shown that Dixon was an old man, 72 years old; that he was not active, but stiff, and that he lived in the country, near Catlettsburg, walking to town probably once a week. It was not shown that he earned anything. As in the Fox case, no earning power was shown at all. The jury were bound to consider, then, the case of a man 72 years old,
42 inactive and stiff, with no earning capacity proven. The burden being on plaintiff, they had no right to assume it, only as in the case of the ordinary run of men similarly situated. His expectation of life, according to the tables, was about 9 years. Now, if the jury had allowed him, over and above his necessary expenses, $300.00 per year, which we claim is high, we should have no such result as their verdict. Remember, the estate recovers only its loss—that is, $300.00—at the end of each year for nine years. It was a question, then, as to what lump sum paid in advance would compensate the estate for the loss of $300.00 per year for nine years—in other words, the present value of $300.00, payable for each respective year for nine years. We submit a table showing exactly what it would be:

| | |
|---|---|
| 1st year, present worth of $300.00 | $283.02 |
| 2nd " " " " | 267.84 |
| 3rd " " " " | 254.22 |
| 4th " " " " | 241.92 |
| 5th " " " " | 230.76 |
| 6th " " " " | 220.56 |
| 7th " " " " | 211.26 |
| 8th " " " " | 202.68 |
| 9th " " " " | 194.76 |
| Total lump sum | $2,107.02 |

But we may go further, and we may double the annual sum this

old man would presumably earn, and the lump sum paid in
43 advance would only be $4,214.04, or we may quadruple it and allow him $1,200.00 per year, and the sum would be $8,428.08—much less than the verdict.

But it seems to us the court must treat this decedent as an ordinary old man "sans eyes, sans teeth, sans everything," with no earning capacity, or at most a very slender one, and to allow a verdict of $10,000 to stand as representing the loss to his estate by his death strikes one as at first blush a travesty on justice and an abandonment of this corporation to the caprices of an arbitrary jury.

3rd. We would direct the court's attention again to the error of the lower court in refusing to remove the case to the Federal court, a proper petition and bond for removal having been filed in due time. The court gives as its reason for so holding that the appellant and its servants, united with it as defendants, are jointly liable. We submit that this court is in error in so holding. It seems to us that it is impossible to escape the reasoning of the cases cited in our brief on this point, to wit:

Warax *v.* C., N. O. & T. P. R'y Co., 72 Fed., 637.
Hukill *v.* M. & B. S. R. R. Co., 72 Fed., 745.

It is easy to say that the appellant and its servants are jointly liable, but not so easy to refute the reasoning of those cases.

In addition to those cases see the case of Hartshorn *v.* R. R. Co., 77 Fed., 9, to the same effect as above.

It may be that the case of Deere, Wells & Co. *v.* Chicago, &c.,
44 Co., 85 Fed., 876, has been or will be cited as an authority to the contrary; but it is not. It expressly recognizes the above cases as correct. That was not a case where the master was sought to be made liable on the principle of respondent superior, but for his own negligence, which it was claimed co-operated with the servant's negligence, and the master and servant were therefore sued jointly upon the same cause of action; not as here, where the master is sought to be made liable for the servant's negligence because of the relation between them, which is one cause of action, and the servant is sought to be made liable for his own negligence, which is another cause of action. Here there was no joint liability, nor could any be claimed.

The cases we rely on have been recently adhered to by Judge Barr, of this Federal district, and that since the decision in 85 Federal, 876; that case was cited to him, but he did not consider it as changing, or attempting to change, the decisions of his Federal circuit.

In the case of Henry Lambert's Administrator *v.* C. & O. R'y Co., pending at Covington, Ky., at last May term of Federal court, he rendered the following opinion, to wit:

United States Circuit Court, District of Kentucky.

HENRY LAMBERT, Adm'r,
*vs.*
THE C. & O. R'Y Co.

*Opinion on Motion to Remand.*

This suit seeks to recover of the defendant, The C. & O. R'y Co., and William Myers and two other employees of the C. & O.
45 R'y Co. for negligence which is alleged to have caused the death of plaintiff's intestate.

William Myers, Walton Elliott, and Charles Long were at the time of the alleged negligence employees of the C. & O. R'y Co. as conductor, engineer, and fireman respectively of the train that ran over and killed the decedent, Enyart, and they are charged with the negligence which caused his death. The defendant railway company is sought to be made liable for these employees' negligence, and is alleged to be jointly liable in this action with these employees.

The employees are alleged to be of the same citizenship with the plaintiff, but they are not before the court by actual service of summons in the State court.

In this condition of the record the C. & O. R'y Co. filed a petition for removal to this court, alleging diverse citizenship between plaintiff and itself, and alleging that the defendants, who were employees, were not necessary or proper parties, and were only made defendants to prevent a removal to this court, and alleging that they and the defendant railway company were jointly liable for the alleged negligence.

The State court allowed the removal of the defendant The C. & O. R'y Co., and approved the bond executed by said company.

The plaintiff has filed answer in this court denying that the defendants Myers, Elliott, and Long were made parties defendant in bad faith or with the purpose of preventing a removal to this court, and moved the court to remand the cause to the Boyd cir-
46 cuit court, from whence the case has been removed.

The motion has been submitted and the defendant railway company has offered no evidence to sustain its allegations of bad faith upon the part of plaintiff in uniting Myers & Elliott and Long as defendants with their employer, the railway company.

Thus the question to be decided is whether these defendants are jointly liable with their employer, the railway company. Here the railway company is sued for the negligence of their servants in and about the business of the railway company, and it is now settled in this circuit that the employees (servants) are not jointly liable with their employer (master), though the negligence was that of the servants; but there must be an election to sue as between the master and his servant unless the master participated in or directed the act or the omission to act which constitutes the negligence.

See Warax *v.* C., N. O. & T. P. R'y Co., 72 Fed. Rep., 638.

The question has not been passed upon by the supreme court, but the decision of the circuit judges was made after full argument and a careful consideration and is clearly binding upon this court; but if not, should be followed.

The question of what would be the condition of the record had Myers and the other employés been made parties by actual service of the summons in the State court cannot arise in this case, as we have seen they are neither before this court nor the State court.

47 The motion to remand to the State court must be overruled, and it is so ordered.

In view of these authorities, we think we are entitled to a reversal of the judgment appealed from.

For these reasons we submit that we should have a rehearing and reversal.

WADSWORTH & COCHRAN,
*Attorneys for Appellant.*

*Authorities.*

Kentucky Central Railway Company *v.* Gastineau's Adm'r, 83rd Ky., 128.
Graham and Watterman on New Trials, vol. 3, pages 1133, 1143, 1153, 1167.
L. & N. R. R. Co., *v.* Fox, 11th Bush, page 495.
Warax *v.* C., N. O. & T. P. R'y Co., 72 Fed., 637.
Hukill *v.* M. & B. S. R. R. Co., 72 Fed., 745.
Hartshorn *v.* R. R. Co., 77 Fed., 9.
Deere Wells & Co. *v.* Chicago &c., Co., 85 Fed., 876.

48 Afterwards, on the 11th day of February, 1899, the following order was entered of record herein:

"Came the appellee, by counsel, and filed a response to the petition for rehearing herein."

Said response is as follows:

Kentucky Court of Appeals.

| | |
|---|---|
| CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant, *vs.* ALEXANDER DIXON'S ADMINISTRATRIX, Appellee. | Response to Petition for Rehearing. |

All the questions that were elaborately argued by opposing counsel for appellant on the original hearing of this case have been again discussed in the petition for rehearing, though the opinion of this court rendered by ex-Chief Justice Lewis distinctly settles all those questions.

We deem it necessary to respond to the petitions for rehearing only in so far as it discusses the instruction as to compensatory damages.

Opposing counsel insist that this instruction was erroneous and

misleading, and cite with confidence the case of Ky. Central R'y Co. *vs.* Gastineau's Adm'r, 83 Ky., 119.

Upon examination of that case it will be ascertained that the judgment below was reversed because the court there told the jury that if the company was guilty of wilful neglect, they "ought" to find punitive or exemplary damages for plaintiff.

2. And, again, that the definition of "wilful neglect" was misleading.

49 3. And, further, that the deceased was a trespasser, and that the court erred in assuming that the company owed him a high degree of care.

These were the reasons for reversing that judgment, and as the case was going back for new trial the court suggested that the instruction as to compensatory damages might lead the jury to find some speculative damages—that is, the instruction might mislead the jury or might have mislead them; but the court there did not pretend to say that the judgment would have been reversed on that instruction alone; they did not decide that it was a reversible error, and so in the case at bar it cannot be said that the instruction given, even if not worded as aptly as it might have been, was so misleading that the judgment ought to be reversed on that ground alone.

Judge Holt seems to have discussed this question of compensatory damages in the Gastineau case as an original proposition, since he does not refer to any authorities on the subject; but upon looking at the citations of the lawyers for Gastineau we find that Judge Lindsay discussed the question in case of L. C. & L. R'y *vs.* Case, 9 Bush, 736, and that Judge Holt must have had that case in mind when writing the opinion in the Gastineau case. If the 9 Bush case prompted the remarks on compensatory damages in the Gastineau case, then we can say without fear of contradiction that the Gastineau case is in no ways similar on this subject to case at bar.

In the 9 Bush case the court instructed the jury as
50 follows:

You will find for the plaintiff—

"Such damages as the jury might deem just and proper by way of compensation, not exceeding amount claimed in petition."

That instruction, of course, permitted the jury to enter upon a field of speculation in finding compensatory damages, and, indeed, was not only misleading, but absolutely erroneous, and such error was reversible error.

Judge Holt says in the Gastineau case that that instruction might allow the jury to find speculative damages. This, we say, was prompted by the 9 Bush case, but there is as much difference between the 9 Bush case and the Gastineau case as there is between night and day. In one case it was reversible error; in the other it is said that it might mislead the jury.

Nor can we agree with the reasoning in the Gastineau case. There the court is made to say that the jury was permitted to fix some speculative value to "compensate plaintiff as administrator for his intestate's life."

What speculative damages could the jury have found for plaintiff as administrator?

Could it have been loss of society and companionship of deceased? Not at all, because deceased never associated with plaintiff as administrator, nor could deceased have been the administra-
51 trix'-companion. Could they possibly under the instruction, agreeing that they — sensible men, have considered anything save "the value of the deceased's power to earn money"?

The court told the jury in fixing compensatory damages they may consider the value of deceased's power to earn money.

That instruction confined the jury to finding for the plaintiff as administratrix. What does that mean? It means the estate of deceased, represented by plaintiff as administratrix; and in compensating the estate, what speculative damages could they assess?

Opposing counsel know that the construction placed on that instruction and argued by counsel below was that the jury could only consider the value of the deceased's power to earn money.

The lower court would not for a second have permitted counsel to argue anything else.

This instruction as to compensatory damages was directly passed on by the court in its opinion in this case, and as said there by ex-Chief Justice Lewis:

"Second. Considering that the crossing was within the limits of of a city, the fact of the number of people usually crossing at that place in vehicles and on foot, and the short distance the track could be seen therefrom looking eastward, it was a high degree of negligence to move the train, when near the crossing, at even *at* the rate of speed admitted by the engineer it was moving."

52 We ask, therefore, that the court say the substantial rights of the appellant have not been prejudiced, even if we concede, which we do not, that the instruction was misleading.

Opposing counsel argues further that this is not a case where recovery could be had for "gross negligence," because the petition only seeks to recover for "negligence."

From this we understand them to say that where a petition alleges that injury resulted from "negligence" a recovery cannot be had for gross negligence.

This is not the rule. On the contrary, this court has held that the allegation "negligence" covers all degrees of negligence, and recovery can be had for "gross negligence" under an allegation simply of "negligence."

See East Tenn. Telephone Co. *vs.* Simm's Adm'r R.

The petition for rehearing should be overruled.

Respectfully submitted.

J. A. SCOTT, &c.,
*Attorneys for Appellee.*

Afterwards, on the 23rd day of March, 1899, the following order was entered of record herein:

"The court being sufficiently advised, the petition for rehearing

herein is overruled. Judges Paynter, Du Relle, and Burnam delivered their dissent. The whole court considered the case."

53 The dissent filed by the foregoing is as follows:

Court of Appeals of Kentucky, March —, 1899.

C. & O. RAILWAY Co., Appellant,
*vs.*
DIXON'S ADM'R'X, Appellee.
} Appeal from Boyd Circuit Court.

*Dissenting Opinion.*

Judges Burnam, Du Relle, and Paynter dissent because in their opinion the instruction fixing the measure of damages is erroneous. It is substantially the same as the instruction given on the measure of damages in the Gastineau case (83 Ky., 119), which was condemned by this court.

Afterwards, on the 24th day of March, 1899, the appellant and plaintiff in error, Chesapeake & Ohio R'y Co., filed a notice of severance as follows:

Court of Appeals of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, &C., Appellants,
*vs.*
LUCY DIXON, Administratrix of Alexander Dixon, Appellee.

54 To R. H. Chalkey and William Sidles:

You are hereby notified that the undersigned, Chesapeake and Ohio Railway Company, sued herein with you, will, on the 24th day of March, 1899, at Frankfort, Kentucky, apply to the Hon. James H. Hazelrigg, chief justice of the court of appeals of Kentucky, for a writ of error, with supersedeas, to the Supreme Court of the United States, and in case you shall not then and there appear and join in said application, the undersigned will ask for a writ of error in its own name.

Signed this 23rd day of March, 1899.

CHESAPEAKE & OHIO RAILWAY CO.,
By WADSWORTH & COCHRAN, *Attorneys.*

The undersigned accept service of the above notice, and hereby decline to join in any application for a writ of error in the above case.

Signed this 23rd day of March, 1899.

W. SIDLES.
R. H. CHALKEY.

On the same day the plaintiff in error filed its writ of error in the clerk's office of the Kentucky court of appeals as follows:

55 UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law of equity of the said State in which a decision could be had in the said suit between The Chesapeake & Ohio Railway Company, R. H. Chalkey, and William Sidles, appellants, and Lucy Dixon, administratrix of Alexander Dixon, appellee, wherein was drawn in question a right and authority existing under the laws of the United States and the decision was against the exercise of such right and authority, and wherein was drawn in question the construction of a statute of the United States and the decision was against the title, right, or privilege specifically set up and claimed under said statute of the United States, a manifest error hath happened, to the great damage of the said Chesapeake & Ohio Railway Company, as by its complaint appears; and whereas it has given written notice to its said co-appellants in said cause of its intention to apply for a writ of error from the Supreme Court of the United States to the said court of appeals of Kentucky in said cause specifying in said notice the time and place of such intended application, as appears from such notice, duly executed on all said parties and which is attached hereto, said coappellants and each of them having, however, failed to appear at the time of the making of such application, which was at the time and place mentioned in said notice, and being therefore made defendants in error herein, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judg-

56 ment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to the laws and customs of the United States shall be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 23rd day of March, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-third.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOMAS SPEED,
*Clerk U. S. Circuit Court, Kentucky District,*
By HENRY F. CASSIN,
*Deputy Clerk.*

Allowed March 24th, 1899.

J. H. HAZELRIGG,
*Chief Justice of the Court of Appeals of Kentucky.*

56½ [Endorsed:] Chesapeake & Ohio R'y Co. *vs.* Lucy Dixon, adm'r, &c. Writ of error. 1899, March 24, filed.

57 On the same day the plaintiff in error filed in said clerk's office its bond, a copy of which is in words and figures following, to wit:

58 Court of Appeals of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, &c., Appellants,
*vs.*
LUCY DIXON, Administratrix of Alexander Dixon, Appellee.

Know all men by these presents that the Chesapeake & Ohio Railway Company, principal, and Andrew M. J. Cochran are held and firmly bound unto Lucy Dixon, administratrix of Alexander Dixon; R. H. Chalkey, and William *D*idles in the sum of fifteen thousand dollars, to be paid to the said obligees herein; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 24th day of March, 1899.

Whereas the above-named Chesapeake & Ohio Railway Company hath prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the court of appeals of Kentucky, the said writ of error to operate as a supersedeas:

Now, therefore, the condition of this obligation is such that if the above-named Chesapeake & Ohio Railway Company shall prosecute its said writ of error to effect and answer to the judgment herein rendered, damages and all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
By A. M. J. COCHRAN, *Att'y.* [SEAL.]
ANDREW M. J. COCHRAN. [SEAL.]

March 24th, 1899.

Approved:
J. H. HAZELRIGG,
*Chief Justice Ky. Ct. Appeals.*

58½ [Endorsed:] Chesapeake & Ohio R'y Co. *vs.* Lucy Dixon, admr., &c. Bond. 1899, March 24, filed.

59 On the same day the plaintiff in error filed in said clerk's office its assignment of errors in words and figures following, to wit:

Supreme Court of the United States.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error, vs. LUCY DIXON, Administratrix of Alexander Dixon, Defendants in Error. } Assignment of Errors.

The Chesapeake & Ohio Railway Company, plaintiff in error in the above-entitled cause, complains of the judgment rendered herein by the court of appeals of Kentucky, and for error therein assigns the following:

I.

The court erred in affirming the judgment of the Boyd circuit court, whereas it should have reversed the same, with directions not to proceed in the said cause.

II.

The court erred in holding in substance and effect that the Chesapeake & Ohio Railway Company had no right under the Constitution and laws of the United States to remove the cause pending in the Boyd circuit court against it to the circuit court of the United States for the district of Kentucky, and that the said Chesapeake & Ohio Railway Company had no right under the Constitution and laws of the United States to have the said cause removed as aforesaid.

60

III.

The court erred in holding that the Boyd circuit court had any right to proceed and further in the said cause after the petition to remove the same on behalf of the Chesapeake & Ohio Railway Company had been filed in the said Boyd circuit court.

IV.

The court erred in holding that the proceedings in the Boyd circuit court after the filing of the petition of the Chesapeake & Ohio Railway Company therein for the removal of the said cause to the circuit court of the United States were not void and of no force and effect as against the said Chesapeake & Ohio Railway Company.

Wherefore the said Chesapeake & Ohio Railway Company prays that the said judgment of the court of appeals of Kentucky be reversed, with directions to take such order in the premises as will result in the nullification of the judgment against it and the removal of the said cause from the Boyd circuit court.

WADSWORTH & COCHRAN,
*Attorneys for Plaintiff in Error,*
*The Chesapeake & Ohio R'y Co.*

March 24, 1899.
5—273

On the same day the plaintiff in error filed its order for record as follows:

61 Court of Appeals of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, &c., Appellants,
*vs.*
LUCY DIXON, Administratrix of Alexander Dixon, Appellee. } Præcipe.

Samuel J. Shackelford, Esq., clerk of the court of appeals:

In making transcript of the record herein for use upon the writ of error to the Supreme Court of the United States from the judgment of the court of appeals allowed herein, you will omit the bill of exceptions, containing the evidence heard upon the trial in the court below, and will copy the entire record except said bill of exceptions for use thereupon, and certify accordingly.

March 24, 1899.

WADSWORTH & COCHRAN,
*Attorneys for Appellant Chesapeake & Ohio Railway Co.*

62 THE COMMONWEALTH OF KENTUCKY, } *sct:*
*Court of Appeals,*

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, hereby certify that the preceding sixty-one pages contain a true and complete transcript of the record and proceedings had in said court of appeals on the appeal of the Chesapeake & Ohio Railway Company, &c., appellants, against Lucy Dixon, administratrix of Alexander Dixon, appellee, except the bill of exceptions (which by order of appellants' counsel is not copied herein), together with the original writ of error (a copy of which is on file in my office), a copy of the bond, order of severance, and assignment of errors, all of which appear of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office.

Done at Frankfort, Kentucky, this 29th day of March, A. D. 1899.

[Seal Kentucky Court of Appeals.]

SAMUEL J. SHACKELFORD,
*Clerk Kentucky Court of Appeals.*

Fee for this transcript, $19.75.

63 Court of Appeals of Kentucky.

CHESAPEAKE AND OHIO RAILWAY COMPANY, &c., Appellants,
*vs.*
LUCY DIXON, Administratrix of Alexander Dixon, Appellee.
} Notice.

To Lucy Dixon, administratrix of Alexander Dixon:

You are hereby notified that we have this day filed with the clerk of the court of appeals of Kentucky a præcipe directing him to omit from the transcript of the record herein, to be made by him for use upon the writ of error allowed to the Supreme Court of the United States from the judgment of the court of appeals of Kentucky, the bill of exceptions, containing the evidence heard upon the trial in the court below, and to copy the entire record except said bill of exceptions for use thereupon, and to certify accordingly.

WADSWORTH & COCHRAN,
*Attorneys for Chesapeake & Ohio Railway Company.*

March 24th, 1899.

Service of above notice by copy delivered this day is hereby acknowledged on behalf of appellee and defendant in error.

JOHN F. HAGER,
*Of Counsel for Lucy Dixon, Adm'x.*

March 28th, 1899.

64 UNITED STATES OF AMERICA:

The President of the United States to Lucy Dixon, administratrix of Alexander Dixon; R. H. Chalkey, and William Sidles, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the 19th day of April next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein The Chesapeake & Ohio Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this March 24th, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-third.

J. H. HAZELRIGG,
*Chief Justice Ct. Appeals Ky.*

I hereby accept service of the above citation on this 28th day of March, 1899.

JOHN F. HAGER,
*Counsel for Lucy Dixon, Administratrix of Alexander Dixon, Dec'd, Defendant in Error.*

65 We hereby accept service of the above citation this March 31st, 1899.

R. H. CHALKLEY.
W. SIDLES.

66 [Endorsed:] Chesapeake & Ohio R'y Co. *vs.* Lucy Dixon, admr., &c. Citation.

Endorsed on cover: File No., 17,382. Kentucky court of appeals. Term No., 273. The Chesapeake and Ohio Railway Company, plaintiff in error, *vs.* Lucy Dixon, administratrix of Alexander Dixon, deceased; R. H. Chalkey, & William Sidles. Filed April 26th, 1899.

In

By

# Supreme Court of the United S

OCTOBER TERM, 19

Filed October 15, 1900

No. 22

CHESAPEAKE & OHIO RAILWAY
COMPANY

vs.

LUCY DIXON, Administratrix, &c.,
R. M. CHALKLEY and WILLIAM [illegible]

Brief for Plaintiff in Error

C. B. SIMRALL,
Of Counsel.

# Supreme Court of the United States

OCTOBER TERM, 1899.

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*CHESAPEAKE & OHIO RAILWAY COMPANY,*
*Plaintiff in Error,*

No. 273. *vs.*

*LUCY DIXON, Administratrix of Alexander Dixon, deceased; R. H. CHALKEY and WILLIAM SIDLES,*
*Defendants in Error.*

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## Brief for Plaintiff in Error.

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### STATEMENT OF THE FACTS OF THE CASE.

On the 22d day of September, 1894, Alexander Dixon, while a resident of and domiciled in Boyd county, Kentucky, was run over and killed by a train of the Chesapeake & Ohio Railway Company, plaintiff in error, at what is known as Pollard's Branch Crossing in the city of Catlettsburg, Boyd county, Kentucky.

On the 29th day of September thereafter, his widow, Lucy Dixon, was, by proper orders of the Boyd County Court, appointed administratrix of his estate and duly qualified as such; and afterwards, on the 19th day of October, 1894, she filed in the Clerk's office of the Boyd Circuit Court her petition in words and figures as follows, to-wit:

"The plaintiff, Lucy Dixon, says that Alexander Dixon departed this life intestate on the 22d day of September,

1894, while a resident of and domiciled in Boyd county, Kentucky; that by an order of the Boyd County Court, made and entered on the ——— day of September, 1894, plaintiff was appointed administratrix of his estate, and gave bond and duly qualified and is now acting as the administratrix of the said estate. A copy of said order is filed herewith as part hereof, marked 'A.'

"She says that the defendant, the Chesapeake & Ohio Railway Company, is, and at the time hereinafter stated, was a corporation and common carrier of freight and passengers for hire, and said defendant—locomotives, cars and other appurtenances now operates, and at the times hereinafter stated, operated lines of railway extending into the county of Boyd and state of Kentucky. She says that on the 22d day of September, 1894, while crossing the track of the defendant at the crossing of the Ashland & Catlettsburg Turnpike Road, and within the corporate limits of said town, the said intestate, Alexander Dixon, was, by the negligence of the defendant, the Chesapeake & Ohio Railway Company, and of its agents and servants, R. H. Chalkey and William Sidles, who were in charge thereof, run over and instantly killed by one of defendant's passenger trains while on its way from Ashland to Catlettsburg, Boyd county, Kentucky, whereby she has been damaged in the sum of thirty thousand dollars.

"At the time and place when and where plaintiff's intestate was injured, as aforesaid, the defendants, R. H. Chalkey and William Sidles, were, and a long time theretofore had been, servants of the corporate defendants, in charge and control of said train, and then and there were, and long time heretofore had continuously been, respectively engineer and fireman of said train, and said negligence of the corporate defendant was done by and through its said servants and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants.

"Wherefore plaintiff prays for a judgment against the defendants—$30,000, for her costs and all proper relief.

"Scott & Dinkle,
"John F. Hager,
"*Attorneys for Plaintiff.*"

And afterwards, upon the 30th day of January, 1895, before answer to said petition was due, the plaintiff in error,

Chesapeake & Ohio Railway Company, filed in said Boyd Circuit Court its petition and bond for removal of the cause to the United States Circuit Court for the District of Kentucky, in words and figures as follows, to-wit:

"PETITION FOR REMOVAL OF THIS CAUSE TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF KENTUCKY.

"Boyd Circuit Court. Lucy Dixon, administratrix of Alexander Dixon, plaintiff, vs Chesapeake & Ohio Railway Company et al, defendants.

"*To the Honorable the Circuit Court of Boyd County, State of Kentucky:*

"The petitioner, Chesapeake & Ohio Ry. Co., respectfully shows that it is one of the defendants in the above entitled suit, and that the matter and amount in dispute in the said suit, exclusive of interest and costs, exceeds the sum or value of $2,000.

"Your petitioner further shows that the said suit is of a civil nature, and that there is in said suit a controversy which is wholly between citizens of different states and which can be fully determined as between them, to-wit, a controversy between your said petitioner, the Chesapeake & Ohio Railway Company, who avers that it was at the time of the bringing of this suit and still is a corporation created, organized and existing under and by virtue of the laws of the state of Virginia and a citizen of the said state of Virginia, and the said plaintiff, Lucy Dixon, administratrix of Alexander Dixon, who, as your petitioner avers, was then and still is a citizen of the state of Kentucky; that the said controvery is of the following nature, viz:

"Whether your petitioner is liable to the said plaintiff for damages on account of the death of the said intestate, alleged to have been caused by the negligence of certain of its servants therein named and made defendants thereto and other of its servants then and there in its employment and who are not named, it being claimed by said plaintiff that because thereof your petitioner is liable in damages to her, and that your petitioner and the said plaintiff are both actually interested in said controversy.

"Your petitioner further states that the defendants R. H. Chalkey and William Sidles, are neither necessary nor proper

parties defendant to this cause, and that they were made parties defendant to this cause for the sole and single purpose to prevent a removal by petitioner of this cause to the Circuit Court of the United States for the District of Kentucky and thereby unlawfully to deprive your petitioner of the right conferred upon it by the Constitution and laws of the United States.

"And your petitioner offers herewith a bond, with good and sufficient security, for its entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that this suit was wrongfully or improperly removed thereto, and it prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept said surety and bond, to cause the record herein to be removed into said Circuit Court of the United States for the District of Kentucky; and we will ever pray.

"WADSWORTH & COCHRAN,
"*Attorneys for Petitioner.*

"STATE OF KENTUCKY, } Sct.
"County of Boyd, }

"I, W. H. Wadsworth, being duly sworn, do say that I am a member of the firm of Wadsworth & Cochran, the attorneys for the petitioner in the above entitled cause; that I have read the foregoing petition and know the contents thereof; that the statements and allegations therein contained are true as I verily believe.

"W. H. WADSWORTH.

"Subscribed by the said W. H. Wadsworth, in my presence, and by him sworn to before me this 30th day of January, A. D. 1895.

"M. F. HAMPTON,
"*D. C., Boyd Circuit Court.*"

"Lucy Dixon, administratrix of Alexander Dixon, plaintiff, v. Chesapeake & Ohio Railway Company et al, defendants. (Bond.)

"Know all men by these presents that we, the Chesapeake & Ohio Railway Company, as principal, and W. H. Wadsworth and A. M. J. Cochran, as sureties, are hereby

held and firmly bound unto Lucy Dixon, administratrix of Alexander Dixon, in the penal sum of one thousand dollars; for the payment thereof, well and truly to be made unto the said Lucy Dixon, administratrix of Alexander Dixon, her heirs and assigns, we bind ourselves, jointly and severally, firmly by these presents.

"Yet, upon these conditions: The said Chesapeake & Ohio Railway Company having petitioned the Circuit Court of Boyd County, State of Kentucky, for the removal of a certain cause therein pending, wherein Lucy Dixon, administratrix of Alexander Dixon, is plaintiff, and the Chesapeake & Ohio Railway Company is defendant—the Circuit Court of the United States in and for the District of Kentucky.

"Now, if the said Chesapeake & Ohio Railway Company, your petitioner, shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all cost that may be awarded by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

"Witness our hands and seals this 29th day of January, A. D. 1895.

"THE CHESAPEAKE & OHIO RAILWAY CO.,

" [SEAL] By A. M. J. COCHRAN.
" [SEAL] W. H. WADSWORTH.
" [SEAL] A. M. J. COCHRAN.

"STATE OF KENTUCKY, } Sct.
"Mason County, }

"We, W. H. Wadsworth and A. M. J. Cochran, both of Mason county, in said state, the sureties in the foregoing bond, being duly sworn, do depose and say, each for himself, that we are residents of the state of Kentucky and property holders therein, and that we are each of us worth the sum of one thousand dollars, over and above all our debts and liabilities and exclusive of property by law exempt from execution, and that each have property in the state of Kentucky liable to execution and of the value of more than one thousand dollars.

"W. H. WADSWORTH.
"A. M. J. COCHRAN.

"Subscribed in my presence by W. H. Wadsworth and A.

M. J. Cochran and by them sworn to before me this 29th day of January, A. D. 1895.

"WM. D. COCHRAN,
"*Clerk Mason County Court.*"

And afterwards, at another day, the said Boyd Circuit Court entered up the following order:

"Lucy Dixon, administratrix, plaintiff, against C. & O. Railway Co., defendant. Ordinary.

"This cause coming up on the motion of the defendant for a removal of this cause to the United States Court for the District of Kentucky, upon its petition and bond already presented, and the Court being sufficiently advised, adjudges that the bond filed be approved; but the Court, having fully considered the same, overruled the petition and motion of the defendant for a removal of this cause to the United States Court for the District of Kentucky; and to this ruling and opinion of the Court the defendant excepts."

The Boyd Circuit Court thereafter proceeded with the trial of the cause, and the jury having upon the 12th day of October, 1895, found a verdict for the plaintiff (defendant in error) in the sum of $10,000.00, judgment for that sum was entered; and plaintiff in error having upon the same day filed its motion and grounds for a new trial, the same was overruled and appeal to the Court of Appeals of Kentucky was taken and prosecuted, and upon the 28th day of October, 1898, the judgment of the Boyd Circuit Court was affirmed in an opinion by Chief Justice Lewis (see Record, pages 17 to 20 inclusive). And afterwards, on the 2d day of January, 1899, plaintiff in error filed petition to move the Court for a rehearing (see Record, page 22). And afterwards, on the 23d day of March, 1899, the petition for rehearing was overruled, Justice Paynter, Durelle and Burnam dissenting. Whereupon writ of error was taken to this Court, and on March 24, 1899, the following assignment of errors was filed in this Court:

"ASSIGNMENT OF ERRORS.

"Chesapeake & Ohio Railway Company, plaintiff in error, v. Lucy Dixon, administratrix of Alexander Dixon, defendant in error.

"The Chesapeake & Ohio Railway Company, plaintiff in error in the above entitled cause, complains of the judgment rendered herein by the Court of Appeals of Kentucky, and for error therein, assigns the following:

"I.

"The Court erred in affirming the judgment of the Boyd Circuit Court, whereas it should have reversed the same, with directions not to proceed in the said cause.

"II.

"The Court erred in holding in substance and effect that the Chesapeake & Ohio Railway Company had no right, under the Constitution and laws of the United States, to remove the cause pending in the Boyd Circuit Court against it to the Circuit Court of the United States for the District of Kentucky, and that the said Chesapeake & Ohio Railway Company had no right, under the Constitution and laws of the United States, to have the said cause removed as aforesaid.

"III.

"The Court erred in holding that the Boyd Circuit Court had any right to proceed any further in the said cause after the petition to remove the same on behalf of the Chesapeake & Ohio Railway Company had been filed in the said Boyd Circuit Court.

"IV.

"The Court erred in holding that the proceedings in the Boyd Circuit Court, after the filing of the petition of the Chesapeake & Ohio Railway Company therein for the removal of the said cause to the Circuit Court of the United States, were not void and of no force and effect as against the said Chesapeake & Ohio Railway Company.

"Wherefore the said Chesapeake & Ohio Railway Company prays that the said judgment of the Court of Appeals of Kentucky be reversed, with directions to take such order in the premises as will result in the nullification of the judgment against it and the removal of the said cause from the Boyd Circuit Court.

"WADSWORTH & COCHRAN,
"*Attorneys for Plaintiff in Error, the Chesapeake & Ohio Ry. Co.*"

## ARGUMENT.

**The cause of action against the Railroad Company, plaintiff in error, and its co-defendants, Chalkey and Sidles, its employes, is not a joint tort, and the controversy as to plaintiff in error is separable from that as to the employes. The master is liable severally only and not jointly with the servants.**

The liability of the master must be founded upon one of two rules.

1. A legal liability which grows out of that public policy which makes the master responsible for the acts of servants done within the scope of business for which they are employed; a rule commonly referred to as *respondeat superior*.

2. A joint responsibility by being present by some representative or superintending officer, or by commanding or directing the act to be done.

In the one case the master must respond, not because it participated in the wrong or was a co-actor in the trespass, a joint trespasser, but because there has been evolved out of the original doctrine of responsibility in case of a tort, which was at first a spirit of revenge, a milder and more benificent responsibility demanded by reasons of public policy, "that such wrongful acts as by ordinary human laws are likely to happen in the course of the service, are imputable to the service."

At first the master was bound to surrender the negligent servant; then, as to negligent acts of the servant, performed with the knowledge of the master, there grew up a personal liability of the master; the noxal action gave way to an action to enforce general personal liability. Then as to certain public personages, such as innkeepers and shipowners, there arose a liability for acts of servants done within their knowledge, likely based upon exceptional confidence reposed in such personages. Perhaps a better reason was that as the master could surrender the servant and

had the alternative to do it or pay, his liability became fixed as to payment in that manner. Another reason was that the master should respond for employing the services of a bad servant. The generality of the reason expanded the principle and the responsibility of the master soon developed as to acts of freemen servants as well as slaves. The Twelve Tables gave way to the Aquilian law, which law itself yielded in turn to interpretation. And from the bare permission to ransom one's negligent slave, has grown up a universal doctrine of responsibility of the master for acts in which there was no part and for which, in no sense, was the master to blame. The Roman rule made to meet an isolated case, has grown into "a universal and unlimited responsibility." Indeed, it has grown to be "an exigency of the social order."

The Teutonic side of this strange parentage of our common law is in line with the Roman rule. But nowhere do we derive the idea that the master being absent is held responsible for the servant's negligent acts upon the theory that he acted in concert with the servant. It is the public policy of the same old rule, which in olden days found a necessity for substantial responsibilty, and for that reason placed upon the master the burden of the servant's acts while about his business. Not because the master must select fit servants, for the master might justify by proving he had done this, but, as put by Mr. Pollock, "I am answerable for the wrongs of my servant or agent, not because he is authorized by me, or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others." Pollock on Torts, page 70 (4th Ed.)

In the other case, the master responds for direct trespass done in concert with the servant either by positive direction or by being present, by some one in representative capacity, participating in the act; in other words, by being a co-actor in it.

There can be no contention that it is sought in this proceeding to hold the master liable upon this second ground, for the petition alleges that the "intestate, Alexander Dixon, was, by the negligence of the defendant, the Chesapeake & Ohio Railway Company and its agents and servants, R. H. Chalkley and Wm. Sidles, who were in charge thereof, run over and instantly killed by one of defendant's passenger trains," and "said negligence of the corporate defendant was done by and through its said servants." Neither is there any contention that the master being absent gave any orders or directions to the servants with reference to the alleged negligent act of running the train over the decedent.

Neither is the question presented one of misjoinder; it need not be considered whether there is a misjoinder in this case, or whether if there is, for that reason the case might be removed by the corporate defendant. This is settled by a number of cases and recently by Judge Shiras in the case of *Deere, Wells & Co.* v. *Chicago, M. & St. P. Ry. Co.* He says:

"The question whether these two controversies—one against the co-employe for his personal negligence, and one against the railway company on the liability of the master for the negligence of its servant—could be properly joined in one suit would seem to be a matter wholly aside from the question of the right of removal. If, upon the face of the petition, it appears that the plaintiff has joined therein two controversies, separate and distinct, and that one of them is between citizens of different states, and involves the requisite amount, then the right of removal is shown to exist, no matter whether the two actions could be properly joined in one suit or not." (See 85th Fed. Rep., page 888).

The allegations of the petition necessarily present to us the simple proposition:

**Is a cause of action against the master for the negligent acts of the servants, done in its absence and without its order or direction,**

**a separable controversy from a cause of action against the servants for the same act of negligence directly brought about by the servants?**

We have endeavored to show by tracing it from its source that the principal upon which the master is held liable in cases of negligent acts of the servant in its absence, does not grow out of any idea of concert of action at all, and we may add, as pointed out by Judge Taft in the leading case of *Warax* v. *C., N. O. & P. Ry. Co.*—

"The rule which permitted a plaintiff injured by the joint act of defendants to join them in one action was rested originally on the theory that they were to be held as conspirators, and that each, having knowingly embarked on the unlawful venture, was liable for all that the other did, and that therefore they could be held as partners in wrong. Joint trespassers were held on the same principle and finally, where two persons were guilty at the same time of mere acts of negligence, operating together to cause injury to a third person, it was held that they must be regarded as acting in concert, and that each must be held liable for the entire damage, as for a joint tort The advantage which this gave the defendant in actual trials was very considerable. Under the old rule, which forbade parties to testify, it prevented one defendant from using the other as a witness. It enabled the plaintiff to take a joint judgment against both, and to enforce it against either. The election which the plaintiff had to sue one or more of the joint feasors grew out of the assumed concert of action which he charged against them all. Hence, the question is whether, when a master is held liable for the negligence of his servant in his absence, which negligence he did not direct, he can be said to have acted in concert with the servant to produce the injury in such a way as that he and the servant can be held liable in the joint action. Clearly not. His liability does not arise from any common purpose that he had with the servant, or from any actual unity of action between them, in point of time and effect, or otherwise. His liability arises simply and solely from the policy of the law, which makes him responsible for the acts of his servant, done in the discharge of his business." (See 72 Fed. Rep., 642.)

It follows, we think, that there can be no action of trespass *vi et armis* against the master for the negligent act of the servant in its absence, and logically and necessarily the action must be trespass on the case.

The liability, however, of the servant is that of a tort feasor as and for his direct trespass, and the action is trespass *vi et armis*. The two causes of action, moreover, are governed not only by different principles of law, but are controlled as between the parties defendant by entirely distinct rules in the respective cases.

In trespass on the case, the master having responded as master for the tortious act of the servant done in its absence, may recover of the negligent servant the amount of the recovery against it, while on the other hand, in the case of an action of trespass *vi et armis*, where the master is joined with the servant in a proceeding against it as being in concert with him as a co-actor or joint tort feasor, there could be no contribution as between the master and servant, and the master can not recover of the servant, or *vice versa*, the amount of the recovery adjudged against them jointly, or either one of them.

Moreover, there is a question of joinder that does arise in this and similar cases which does not relate to the joinder of two causes of action in one proceeding, but does relate to the joinder of master and servant in one cause of action. The cases which hold that the master and servant may be sued together in one cause of action, or, in other words, which hold that the liability is joint and for the same reason as to both defendants, are based upon certain language of Judge Cowen in *Wright* v. *Wilcox*, 19 Wend., 343, which appears to be the leading case for the view that the liability is joint and that the master and servant "are both guilty of the same negligence at the same time and under the same circumstances—the servant in fact, and the master constructively, by the servant, his agent."

This is in effect an attempted extension of a fiction peculiarly adapted and applied to the doctrine of principal and agent in cases of contract, etc., to cases of trespass, a transposition of the master into the shoes of the servant by a fiction of substitution. The opinion in the case cited quotes the rule laid down by Hammond that the question is "whether the principal and inferior may be charged jointly depends on whether the inferior is liable as a trespasser *vi et armis*, or in case only. If the latter, they may be sued together, but otherwise if the former; it being held, how justly may be questioned. that a principal is liable for his agent's misconduct only in case."

And this rule the Judge approves in the main, but suggests that it seems to be shaken by the case of *Moreton* v. *Hardern*, 6 Dowl. & R., 275. And this suggestion has been the text for every case from that day to this, all of which blindly follow *Wright* v. *Wilcox*.

Judge Taft, following Judge Metcalfe, in *Parsons* v. *Winchell*, 5 Cush., 592, we think effectually disposes of the suggestion of Judge Cowen in the following language:

"The English case of *Moreton* v. *Hardern*, above cited, is not at all in conflict with the view taken of the cases in Massachusetts, and other cases cited above, in which it is held that a master is not jointly liable with the servant for mere negligence. In that case the three owners of the coach were held liable jointly for the act of one of them. In that case the three were all principals, and were responsible for the act of the one who was the servant. The fact, therefore, that they were jointly sued, and the suit was maintained, did not at all establish the principal that, if the one through whom the injury had been inflicted was not a principal with the other two, a suit against the three could have been sustained. This distinction is pointed out by Judge Metcalfe in *Parsons* v. *Winchell*, *supra*." *Warax* v. *Railway Co.*, *supra*.

In the case of *Moreton* v. *Hardern*, the plaintiff had his election or could have proceeded against the driver in tres-

pass for the direct act as driver without regard to any allegations of ownership whatever; or he could have proceeded against him in case as principal and owner for his responsibility as master for his acts as driver. The question then does depend upon whether the servant, as servant alone, may be sued in case, if not, then the causes of action are different and the controversies are separable.

A few courts in this country have followed *Wright* v. *Wilcox*, but the great weight of authority is opposed to the *dicta* of that case. This leading case of *Wright* v. *Wilcox*, decided in 1838, was based on the following facts:

"The plaintiff's minor son was run over by a wagon driven by S. Wilcox, son of J. Wilcox. The son driving the wagon was in the employment of his father. The lad who was hurt asked leave to ride in the wagon, which was granted. The boy attempted to get on the wagon, taking hold of the side between the hind and front wheels. S. Wilcox did not stop his team, though warned by a bystander that if he did not the lad would be killed. Looking around and seeing other boys, as well as plaintiff's, trying to get on the wagon, he whipped his horses from a walk into a trot. The plaintiff's son fell off and was seriously injured by one of the hind wheels. This was a joint action against Wilcox and his son. Motion for non-suit was denied."

The action was against father and son and was trespass on the case. A new trial was granted upon the ground that the master was not responsible for the wilful act of the servant, and what Judge Cowen said as to the former action was not necessary for the disposition of the case and was mere *obiter dicta*. Nevertheless, it has been followed by quite a number of cases. Judge Cowen, however, in the course of the discussion of the real question upon which the case was determined and new trial granted, quoting from Reeves on Domestic Relations, 357, gives an insight into his reasons for the responsibiliiy of the master when he says:

"Why is the master chargeable for the act of his servant? Because, what a man does by another, he does by himself."

Here we find, we think, the true difficulty with the *obiter* in *Wright* v. *Wilcox*, and the cases which follow it. We shall see that the very next case in New York (1850) adhered to *Wright* v. *Wilcox* upon this ground. That was the case of

*Suydam* v. *Moore et al*, 8 Barb., 858.

This was a cow case and the action was brought against the engineer, Moore, and the fireman, Losee, for running over the plaintiff's cow, and Willard, Justice, citing *Wright* v. *Wilcox* and Reeves, says:

"The master is liable for the acts of the servant while acting within the scope of his authority, upon the principle that what a man does by another, he does by himself."

But this action turned upon a statute of New York making all railroad companies, and also all railroad employes, liable for killing stock where the railroad company had not built fences and cattle guards, and the inquiry of the Court as to the liability of the master was not at all necessary for the disposition of the case, as the statute itself made the employes liable, and the master was not sued.

The next case (1854) was the case of

*Montfort* v. *Hughes et al*, 3 Ed. Smith, 591.

Sarah Montfort brought a suit in the Marine Court against the servant, Wild, and Hughes et al, his masters, for driving the horses belonging to Hughes and the other master over the plaintiff. Defendants did not appear on the first day of the trial, and one of the witnesses had been introduced, but on the last day the defendants did appear and pleaded to the merits and on motion. Wild, the servant, was stricken from the record as a party and used as a witness, on the idea that the servant and the masters were improperly joined. The Appellate Court, in an opinion by Woodruff, Justice, held (1) that the motion to strike Wild from the record was too late. This should have dis-

posed of the case, but the Court went on, and quoting *Wright* v. *Wilcox*, said: "And it is moreover held that in a case like the present there was no misjoinder," and likening the case under discussion to the case of *Michael* v. *Alextree*, 2 Levinz, 172.

The difficulty here is, the case of *Montfort* v. *Hughes* was not the case of *Michael* v. *Alextree*. In the latter case, although the master was absent, the joinder was held to be good, because the Court said "it shall be intended the master sent the servant to train the horses there;" and in Keble's Rep., 3 Keble, 650, it is stated that the Court said "it is at the peril of the owner to take strength enough to watch them" (the horses) "and the master is as liable as the servant, if he gave him order for it; and the action is general for bringing them thither." And, as pointed out by Judge Metcalfe in *Parsons* v. *Winchell*, the principle decision in that case was "that the master, though absent, had ordered the servant to train intractable horses in a place constantly thronged with persons, and was, therefore, in legal intendment, guilty of the act of training them there, jointly with his servant."

Justice Woodruff also cites the case of *Moreton* v. *Hardern*, *supra*, which we have heretofore seen is not in point.

This case was followed by a case in 1864—

*Phelps* v. *Wait*, 30 N. Y., 78.

In this case the plaintiff was crossing a street. The defendant, Nathan Wait, was driving a team and wagon, the property of his father, William Wait, in whose employment he was and who was absent. Nathan Wait, while in an altercation with a drunken man, suddenly and rapidly drove the team out of the yard and ran over plaintiff, who sued both father and son. The case presented three questions, two of which were practically conceded and scarcely referred to. The third contention was as to the right to

join master and servant, and Justice Hogeboom, citing *Wright* v. *Wilcox*, disposed of that question by the following astonishing remarks:

"The case was retained for examination principally upon the other point—the supposed misjoinder of parties—and to enable the defendants' counsel to supply a reference to authorities showing that in analogous cases principal and agent could not be sued together. The current of authority is certainly the other way, and in favor of the right to join these parties. *And I have been unable, after a somewhat diligent examination, to find any reported case holding a contrary doctrine.*"

The next New York case (1870) was

*Priest* v. *Hudson R. R. Co.*

This was an action for assault and battery. The defendant's brakeman, who was not joined, violently ejected the plaintiff from the train, the plaintiff having no time to procure a ticket, and the question in the case was, did the statute of limitations of two years in cases of assault and battery, apply? The Court, by Justice Monell, held it did, and that the action against the railroad company was for assault and battery. It seems, by a provision of the code of New York, all forms of action had been abolished and reduced into one form, "civil action," and there was no longer any action so called, of assault and battery, or trespass, or tresspass on the case, but simply a civil action which embraced them all. But the Court citing *Wright* v. *Wilcox*, says:

"Under the old form of actions, I can not doubt this would have been trespass, assault and battery, and not trespass on the case."

And again,

"The liability of defendants proceeds upon the principle of agency."

And again, referring to the distinction between trespass

and trespass on the case and cases upholding a different view, he says:

"In this country, however, and particularly in our state, this rigid strictne s was greatly relaxed before the code, and trespass and case were mostly concurrent remedies. Assuming then, as the plaintiff must assume, that the liability of the defendants arises from the act having been done by their servant in the course of his employment, and not negligently or unskillfully, then it follows that it was a joint trespass for which a joint or several actions against either could be sustained, but the action would be for the same cause, *for what a master does by his servant, he does by himself.*"

Still following the principle enunciated in *Wright* v. *Wilcox*; but it appears that this was not necessary for the decision of this case because the code had abolished the action of assault and battery by that name, and all actions were reduced to civil actions.

We have found three other states of the Union in which the New York cases have been followed.

The first, in 1874, is the case of

*Newman* v. *Fowler*, 37 N. J. Law, 89.

In this case plaintiff had employed the defendant, Fowler, as an architect to oversee the putting up of a building, which building, by the verdict, was held to be defective in workmanship and materials in consequence of the want of care of the contractor and architect. The suit was solely against the architect, and Beasley, Chief Justice, in disposing of the case, said:

"Whenever the damage is the product of the contributory misfeasance, the action will lie against each wrongdoer, and the person thus sued will be held for the entire detriment. It is a familiar rule of practice that all or any of joint trespassers may be prosecuted, and that such as are thus sued, must answer for all the consequences of the wrong done. Nor can they claim contribution, the one from the other, so as to dispense the loss equally among themselves, the reason being that the law will not undertake to adjudge the burthens of misconduct."

There is no case of master and servant presented here. It is a case of joint tort feasors pure and simple. Both guilty of misfeasance and both responsible directly as tort feasors. There is no doctrine of *respondeat superior*, because the Court is talking about contribution as between joint tort feasors and not contribution as between master and servant. It certainly could not be contended that as between the master, responsible on the doctrine of *respondeat superior*, and the servant, there could be no contribution.

The next case (1876) is that of

*Wright et al* v. *Compton*, 53 Ind., 337.

This was a blasting case. The plaintiff, Compton, sued Wright, the owner of the quarry, and King et al, employes, for blasting along the public highway upon which he was traveling and for injuries received therefrom. Biddle, Justice, held as follows:

"The general rule is that a master is responsible for injuries to others resulting from the carelessness or negligence of his servants while in the performance of the master's business."

In which he says he follows *Evansville R. R. Co.* v. *Baum*, 26 Ind., 70, which case, while conceding that trespass will not lie against the master for the act of the servant, strangely enough treats that as a purely technical objection. There seems to be no real difference between these cases and the case of *Michael* v. *Alextree* in principle. It would seem that the master who orders and directs blasting along a public highway is in the same attitude as the master who directs the driving of unruly and dangerous horses in a public highway.

The next case (1895) is from the Supreme Court of Wisconsin, and is

*Greenberg* v. *Whitcomb Lumber Co. et al*, 63 N. W. Rep., 93.

The plaintiff sued the Lumber Company and Parlan Semple, its managing agent, for injuries received from operating a defective wood machine, and the Court held that there was but a single cause of action. The petition charged that both the defendants knew that the machine was defective and dangerous and that it was defectively and insecurely fastened to its shaft. The plaintiff was an employe. The duty of the defendant company was to furnish him safe and proper machinery to work with, and the failure upon its part to do this made the company directly responsible to the plaintiff if injured on that account. The allegations of the petition make this apply equally to the superintendent, and charges this duty upon both defendants, and he, if proven, should recover as and for a direct tort in that respect, and if the recovery was on that ground there could be no contribution between the company and the superintendent to dispense the amount of the recovery because they were both direct tort feasors; and no reason appears from the facts of this case for citing *Wright* v. *Wilcox* as authority for sustaining a suit in which two joint tort feasors had been joined. Newman, Justice, says in that opinion:

"The complaint states but a single cause of action. It is the same cause of action against both defendants arising from the same acts of negligence."

Thus far the Court presents the true condition of things, but he continues:

"The master for the negligence of its servants; the servant for his own misfeasance. Both master and servant being liable for the same acts of negligence may be joined as defendants."

The facts of the case show that the master was not held on any idea of responsibility for the acts of the servant, but for its own act in not furnishing proper machinery for its employe to work with, while the servant was held upon the

same identical ground, coupled with his further direct act of putting the man to work with such a machine, which was misfeasance.

We claim that these cases rest upon a misconception of the maxim, "*Qui facit per alium facit per se*," which maxim stretches the rule which substitutes the master in the place of the servant for authorized or ratified acts into a fiction which attributes the direct act of the servant to the master as his direct act. We have already cited the criticism of Mr. Pollock upon this interpretation of the maxim. A very early case reached the same conclusion although by, maybe, a different process of reasoning.

In *Sharrod* v. *London, etc., R. R. Co.*, the Court said:

"The maxim, '*Qui facit per alium facit per se*,' renders the master liable for all the negligent acts of the servant in the coarse of his employment, but that liability does not make the direct act of the servant the direct act of the master. Trespass will not lie against him, case will * * * unless the act was done by his command; that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it, or some act which leads by a physical necessity to the act complained of." 4 Exch., 580.

The leading case in America in support of the position that master can not be joined in the same cause of action with the servant for the negligent act of the servant done in the master's absence and without his order, is the case (1850) of

*Parsons* v. *Winchell et al*, 5 Cush., 592.

This case is from the Supreme Court of Massachusetts. It was an action on the case of Parsons against Powers, the servant and his master, Winchell, who owned the wagon, and Luddington, the owner of the horses drawing the same.

The complaint was that Powers negligently drove the said wagon and horses against the horse and wagon of plaintiff and injured same, Winchell not being present.

The Court below held that Winchell could be joined with Powers if the injury was occasioned by the negligence of Powers, and he was at the time in the service of Winchell.

The Supreme Court, in reversing the lower court (Metcalf, J.), said:

"The question to be decided is, whether this action on the case, brought against the owners of horses and a carriage, and their servant, the driver, jointly, can be maintained for an injury done by the negligent driving of the servant, in the absence of the owners. And we are of the opinion that it can not.

"To maintain an action against two or more jointly, the plaintiff must show a joint cause of action. In an action *ex delicto*, the act complained of must be the joint act of all the defendants, either in fact, or in legal intendment and effect. In trespass, all are principals, and he who commands a trespass, to be committed, though absent when it is committed, is regarded as a trespasser, and may be sued alone, or jointly with him who obeyed his command. And it has been decided, where one of several proprietors of a coach and horses acted as driver in the absence of the others, and injured a third party, by negligent driving, that he and the other proprietors were jointly liable to such party, in an action on the case. *Moreton* v. *Hardern*, 6 Dowl. & Ryl., 275, and 4 Barn. & Cres., 223. They were all held to be responsible for the conduct of the person whom they suffered to drive, whether he was one of themselves or their servant. But the act of a servant is not the act of the master, even in legal intendment or effect, unless the master previously directs or subsequently adopts it. In other cases, he is liable for the acts of his servant, when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor. He is liable, says Lord Kenyon, 'to make a compensation for the damage consequential from his employment of an unskillful or negligent servant.' 1 East., 108. The servant also is answerable to the party injured by his acts done as servant, and is answerable to the master for any damages which the master may be compelled to pay for his wrongful acts, unless those acts were directed by the master. But if the master and servant were jointly liable to an action like this, the judgment and execution would be against them jointly, as joint wrongdoers, and the master, if he alone

should satisfy the execution, could not call on the servant for reimbursement, nor even for contribution. *Merryweather* v. *Nixan*, 8 T. R., 186; *Vose* v. *Grant*, 15 Mass., 505, 521.

"It is said, in Hammond on Parties, 77, that where a Sheriff's bailiff, or a carrier's servant, is liable for causing a breach of duty, he can not be charged jointly with his superior, since the grounds of their liability are different. And it was decided, in *Campbell* v. *Phelps*, 1 Pick., 62, that a Sheriff and his deputy could not be joined in an action for the act of the deputy alone, though both were severally liable for the act. That case, as it seems to us, is not distinguishable from the case at bar. And we find no decision to the contrary, though it was said by Cowen, J., in *Wright* v. *Wilcox*, 19 Wend., 343, that he saw no reason why a joint action, like the present, would not lie.

"In 1 Walford on Parties, 564, 565, it is said that 'the only instance' in which a principal is chargeable for the acts of an inferior, so as to afford a joint right of action against both, is that of a Sheriff who is chargeable jointly with his under-officer, when the latter commits a tort under color of executing legal process. See, also, Broom on Parties, 273, 274."

This was approved in 1862 by the case of

*Hewett* v. *Swift et al*, 4 Allen, 420,

and in 1877 by the case of

*James Mulchey* v. *Methodist Reg. Soc. et al*, 125 Mass., 487.

In this case, Gray, C. J., says:

"But the jury should have been instructed as requested by the defendants, that this action, being in the nature of an action on the case, could not be sustained against both the society and its agents. If there was any negligence in the agents, Barber and Sleeper, for which they could be held liable, their principal, the society, would be responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be neither in fact nor in legal intendment the joint act of the principal and of the agents, and therefore both could not be jointly sued. It is not like the case of a willful injury done by an agent by the command or authority of his principal, in which both are in law principal trespassers and therefore liable jointly."

Massachusetts is followed by many other states.

In Ohio the leading case is

*Clark* v. *Fry*, 8 Ohio St., 358,

which was an action against Clark, the owner, for making an excavation in front of his premises in the street, and for the act of his servant in negligently leaving it in an unfenced condition, by reason of which Fry was injured. The Court said:

"But whether the liability to the defendant in error, if any existed, attached to Freeman alone or to Clark for the negligence of his servant or agent, or to Clark and Freeman as joint tort feasors, depended upon a legal question arising upon the relation between Clark and Freeman in respect to the transaction alleged as the occasion of the injury. If the excavation had been *ipso facto* unlawful, as an unnecessary encroachment on the street, Clark and Freeman would have been liable, if any liability existed, jointly as wrong doers. But if there was nothing in the work that Clark had required by the contract to be done which was in itself unlawful, or which, properly done, could be the occasion of an injury to any one, and Freeman, wholly free from the control of Clark as to the manner of doing the work, had by his own wrongful and negligent conduct been the cause of the injury, he alone would be liable. If, however, Freeman, acting under the control and direction of Clark as his servant or agent, had negligently and wrongfully allowed the excavation to be in an unfenced or otherwise dangerous condition, whereby the injury was sustained, Clark would be liable, although not jointly, with Freeman. In this last instance supposed either Clark or Freeman might be sued separately; but inasmuch as Clark, although he could not excuse himself on the ground that the nuisance had been occasioned by the negligence of Freeman, would have a right of action against Freeman for the recovery of such damages as he might be compelled to pay by reason of his negligence, he (Clark) could not be joined in the same action with Freeman. This doctrine was expressly ruled in *Parsons* v. *Winchell*, 5 Cush., 592, and it appears to rest upon a reason which is entirely satisfactory."

This case was followed by *Seelen* v. *Ryan*, 2 Cin. R., 158. From the Supreme Court of Maine we find the case of

*Campbell* v. *Sugar Co.*, 62 Me., 553.

Here the defendant corporation owned a wharf, and it and its general agents in charge of it were sued by Campbell for injuries received while rightfully using the wharf and because of failure to repair it. The Court said:

"The corporation is answerable for its constructive negligence, or, perhaps (to speak more exactly), on the principle of *respondeat superior*, and must be held, as Lord Kenyon remarked (1 East., 108), 'to make a compensation for the damage consequential from the employing of an unskillful or negligent servant.' The other defendants, who were the general agents of the corporation, and had the care of this wharf, and who, through their senior partner, had agreed with the lessees to make all needful repairs, are certainly in no better position than their principal. It is the actual, personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation; and when their acts or neglects result in injury to third parties, they are equally responsible with their principals. But it does not thence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, but we think there are substantial reasons, assigned in *Parsons* v. *Winchell*, 5 Cush., 592, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking, their joint act or neglect which causes the injury. The proper adjustment of the final responsibility as between themselves can not well be affected if one who has distinct grounds of action against them—against the agents for their own negligence, and against the principal because the law makes them responsible for the negligence of their servants—is permitted to recover against both in one suit. The distinction between actions on the case arising from negligence and actions of trespass, where the wrong is inflicted at the command of the superior, in this respect, is well marked, and goes somewhat deeper than mere form."

In New Hampshire we find the case of

*Page* v. *Parker*, 40 N. H., 47.

Parker was sued in tort for fraudulent misrepresentations of his agents in a sale of property, he not being present and not knowing of the misrepresentations. The Court said:

"In an action *ex delicto*, the act complained of must be the joint act of all the defendants, either in fact or in legal intendment and effect. But the act of a servant or agent is not the act of the master or principal, even in legal intendment or effect, unless the master or principal previously directs or subsequently adopts and ratifies it. *Parsons* v. *Winchell*, 5 Cush., 593. There is no contribution among joint wrongdoers, and if David M. Parker could be found guilty as a joint conspirator and defrauder with the other defendants, solely upon evidence of the unauthorized fraudulent acts and representations of his agent and the person employed by him to aid in effecting a sale, and he should be compelled to satisfy the judgment recovered against all, he would be entirely without remedy for reimbursement, or even contribution against the other defendants, however utterly unauthorized and disapproved those fraudulent acts and representations might have been. Unless, therefore, the plaintiff be able to show the joint participation of David M. Parker in the alleged fraudulent purpose and design of the other defendants, it would be manifestly unjust that he should be holden liable with them in the present action, even though he might be clearly liable, if sued separately, for the damage resulting from the unauthorized fraud of the agent employed by him to sell his property, since it is well settled that a principal has a remedy over for damages he may be compelled to pay in consequence of the unauthorized misfeasance and malfeasance of his agent."

We find the Kentucky Court of Appeals in line with the principles we have been discussing, in the case of

*Perkins* v. *Stein & Co.*, 94 Ky., 433.

Stein & Co. owned a brewery in Louisville and operated numerous wagons over the streets of Louisville, and whilst so engaged their agents and drivers carelessly ran over the plaintiff, Perkins. The plaintiff, Perkins, having died, his administratrix moved to revive the action, and it was argued

by the defendants (below) that the cause of action was assault and battery and under the statute could not be revived. Judge Hazelrigg (now Chief Justice), delivering the opinion of the Court, said:

"It is contended by the appellees that the negligent act of the servant or driver in running over the plaintiff was a trespass, and, therefore, an assault and battery in the meaning of the statute, and that for the injury growing directly out of this act, an action of trespass would lie at the common law, even against the master. Such an action, they contend, under the authority of *Anderson* v. *Arnold's Ex'cr*, 79 Ky., 370, dies with the person. We do not think, however, that the action is one of trespass. While the injury was the immediate consequence of the act, and in this particular the requirements of the rule in actions of this class is met, yet it was not the act of the master; the latter may be responsible in damages, indeed, ordinarily is, for the negligence of his servant, but case and not trespass is the proper remedy." (See page 435).

In the Federal Court there is an abundance of authority in support of our contention and none that we have been able to find to the contrary. We have seen the leading case is

*Warax* v. *C., N. O. & T. P. Ry. Co., supra.*

This was followed by

*Hukill* v. *Maysville & B. S. R. R. Co.*, 77 Fed. Rep., page 745.

Hukill, an employe of the Chesapeake & Ohio Railway Company, while at work upon one train, was struck by a board projecting from the roof of another train, and joined as defendants, the Chesapeake & Ohio Railroad Company for which he worked, and which was operating the road, the lessor company, Maysville & Big Sandy R. R. Co., and sundry employes, alleging that all the defendants were guilty of joint negligence. Judge Taft, also deciding this case, said:

"It is true the petition charges that all the defendants were guilty of joint negligence, and that all of them placed the car where it was in its defective condition; but, in the absence of a specific allegation that the defendant railway company was present, by some representative or superintending officer, we must assume that the company was only constructively present in the persons of its agents, the car inspectors and brakeman who are made co-defendants, and that its liability is not based on anything akin to the personal interference of a natural master. The case of *Campbell* v. *Sugar Co.*, 62 Me., 552, was a case in which the liability of the principal arose, as here, from a positive duty enjoined on him, and not simply from the public policy which makes the master liable for the negligence of his servant in and about his business; and yet it was there held that the master and servant were not properly joined unless actual concert of action, or something equivalent thereto, was shown. And a similar relation existed in the case cited by the Court in *Clark* v. *Fry*, 8 Ohio St., 358, 377, between the master and servant, with respect to the character of the act made the basis of that action.

This case is followed by

*Hartshorn* v. *A., T. & S. F. R. R. Co.*, 77 Fed. Rep., page 9.

Hartshorn was an employe of the defendant railroad company, and while engaged as brakeman was struck by a water spout projecting from a tank which had been constructed by a contractor for his use while working a steam shovel in doing certain work for the railroad company, and the petition alleges that the injury was the result of the negligence and carelessness of both defendants, and each of them, in constructing the water tank and spout and permitting the same to be so near to the main track and not warning plaintiff of the location thereof and danger. Philips, Judge, quoting *Warax* v. *Hukill*, *supra*, says:

"The form of action, therefore, on the part of plaintiff against the defendant railroad company, would at common law be an action on the case; while the liability of Brad-

bury to the plaintiff would spring from his willful act in constructing the dangerous obstacle so near to the railroad track as to endanger the lives and limbs of employes on the railroad performing a duty similar to that ascribed to plaintiff, and the form against him would be trespass *vi et armis*. In such contingency, according to the rule laid down in *Warax* v. *Railway Co.*, 72 Fed., 637, the action by the plaintiff against two such wrongdoers would not be joint, but several. On the other hand, giving to the averments of the petition their most favorable construction to the pleader, the liability of the defendant, Bradbury, for the injury in question rests upon his positive wrongful act in erecting a dangerous obstacle near to the railroad track, and the liability of the railroad company to the plaintiff as an employe in its service would spring from the obligation imposed upon the master to provide the servant with a reasonably safe place in which to perform his work. In this respect the facts of the case disclosed by the petition are not distinguishable in principle from those of *Hukill* v. *Railroad Co.*, 72 Fed., 745. The petition in that case was lodged against the Maysville & Big Sandy Railroad Company, the Chesapeake & Ohio Railway Company and five other persons who were in the employ of the Chesapeake, etc., Railway Company. The railroad belonged to the Maysville, etc., Railroad Company, which it had leased to the Chesapeake, etc., Railway Company, and the plaintiff's intestate was in the employ of the Chesapeake Railway Company as one of the crew connected with the switching of locomotives. While at work about a train of freight cars, Hukill was struck by a board projecting from the roof of another train of freight cars of said company and was killed. The petition alleged that the projecting board was on the roof of said car, and for a long time it constituted a defect endangering the bodies and lives of the employes of said railroad company, and that said car with said projection was placed by the defendants (meaning the said railroad company and the other defendants) where the said Hukill was struck by said board, and that the said defendants, with wanton negligence, permitted said defective car to remain where the same was, and wantonly and negligently failed to remedy said defect; that the other defendants, employes of the Chesapeake Railway Company, as car inspectors and repairers, inspected said car from which said board projected long before the decedent was knocked down

thereby, and had knowledge of this defect long prior to the injury and had ample time in which to remedy the same. The cause was removed from the state court into the Federal court of Kentucky on the petition of the Chesapeake Railway Company. It was again held, following the case of Warax, that the cause of action was separable, and therefore removable upon the petition of the Chesapeake Railway Company. The Court, composed of Judges Taft and Lurton, said:

"'The master's liability arises from his implied contractual obligation to his servant to furnish a reasonably safe place in which, and reasonably safe appliances with which to do his work. The liability of the servants charged as defendants in this case was to arise from their personal and affirmative acts directly causing the injury, as for trespass. No concert of action is alleged between the master and his servants in this case. On the contrary, the petition is full of allegations that, if the servants had done their duty to their master properly, no injury would have resulted to the plaintiff. It is true the petition charges that all of the defendants were guilty of joint negligence, and that all of them placed the car where it was in its defective condition; but, in the absence of a specific allegation that the defendant railroad company was present by some representative or superintending officer, we must assume that the company was only constructively present in the persons of its agents, the car inspectors and brakemen, who are made co-defendants, and that its liability is not based on anything akin to the personal interference of a natural master.'

"So, in the case at bar, in the physical causation there was no actual concurrence or concert of action among these defendants. By reason of the act of Bradbury in placing the water spout where he did, the injury came to plaintiff unaided, and in no degree promoted, by any movement or encouragement of the railway company. Therefore, there were no two forces put in motion, one by one defendant and the other by the other defendant, which co-acted in producing the given result. The misfeasance of Bradbury was the *vis major* which singly and alone wrought the mischief to the plaintiff and gave him an action in tort against Bradbury, independent of any contractual relation, while the railway company's liability is wholly constructive, dependent on a contract obligation which the law implies from the relation of master and servant. It seems to me, therefore,

illogical to say that this cause of action is not severable because of the concurring torts of two defendants, when the act of one was positive, a misfeasance, and the other was negative, a non-feasance; that is, it must depend upon a contractual relation between master and servant. And the right of severance ought the more especially to exist in a case like this, where the misfeasance of Bradbury was wholly independent of, and, as between him and the railway company, was not promoted by the company, and where the injury resulting from Bradbury's tort was complete without any act of the company other than of omission in failing to do something independent of Bradbury. It is to be conceded to the contention of the learned counsel for plaintiff that there is on this question of procedure a division of opinion among respectable courts; but, in my humble judgment, the conclusion reached by Judges Taft and Lurton rests upon the better reason, and, in the absence of a ruling more obligatory upon this court of trial, their judgment will be followed."

This case was followed January 17th, 1898, by the case of

*Deere, Wells & Co.* v. *C., M. & St. P. Ry. Co.*, 85 Fed., 876.

This was an action against the railway company and its section foreman for damages to plaintiff, occasioned by setting out a fire on the railroad right of way to clear it of dry grass, etc. Shiras, J., said:

"In further support of the right of removal, counsel for the railway company rely upon the proposition that 'a master is not jointly liable, and can not be jointly sued with his servant, for an injury caused by mere negligence of the latter in the master's absence,' and in support thereof cite a number of cases decided in the state courts, and also the cases of *Warax* v. *Railway Co.*, 72 Fed., 637; *Hukill* v. *Railroad Co.*, *Id.* 745, and *Hartshorn* v. *Railroad Co.*, 77 Fed., 9. In the leading case of *Warax* v. *Railway Co.*, in which this general question is very fully and ably discussed by Judge Taft, the plaintiff was a switchman in the employ of the railway company, who was injured, while engaged in coupling cars, through negligence in the movement of the train by the engineer thereof. Suit was brought against

the engineer and the railway company in a state court in Kentucky, and the railway company petitioned for removal of the case on the ground that the plaintiff was a citizen of Kentucky; that the railway company was an Ohio corporation; that the engineer, Snyder, was a citizen of Kentucky, but had been joined as a co-defendant for the sole purpose of defeating the right of removal to the Federal court. In the course of the opinion it is pointed out that the act of negligence in the movement of the train was an act of misfeasance on the part of the engineer, for which he was primarily and directly responsible to the plaintiff, whereas the railway company could only be charged with responsibility by showing that, as master, it could be held liable for the negligence of its servant, because the servant was engaged in and about the business of the master. Thus, the facts appearing on the face of the petition showed that the legal ground of liability upon which it was proposed to hold the defendants responsible was different as to each defendant, and upon this view of the case it could be said that there were involved therein severable controversies, because each was based upon different legal principles, and, if this were true, then the case could be removed on that ground. Clearly, under the statute, the Warax case could not be properly removed into the Federal court unless it involved a severable controversy. The court held that the engineer could not be regarded as a nominal or sham defendant, and expressly found that the facts averred in the petition showed a cause of action in favor of the plaintiff against the engineer for his personal misfeasance. This action, rightfully brought in the state court by the plaintiff against the engineer, was a suit between citizens of the same state, which could not be removed to the Federal court unless the case also involved another controversy, separate and distinct, existing between the plaintiff and the defendant railway company, citizens of different states. So far as the reasoning in that case is in support of the proposition that the facts in the petition contained showed that the plaintiff was relying on two grounds of legal liability, the one being the direct liability of the engineer for his personal misfeasance, and the other being the derivative liability of the master for the negligence of the servant, it seems to be well founded."

The Court, after discussing the question of misjoinder in the Warax case, continues:

"But whatever may be said of the real ground upon which the decision in the Warax case is founded, it is clear that the case, as appears by the facts alleged in the declaration therein, belongs to the class wherein the plaintiff seeks recovery against one defendant for his personal misfeasance, and against the other because this misfeasance was committed by one occupying the relation of servant to another, and the latter is sought to be held liable, not for any failure on his part to meet the requirements of the law, but on the ground that the master, though personally free from fault, must respond for the negligence of his servant, because the same happened in the business of the master." (Page 888).

The case at bar presents substantially the same state of pleading as the Warax case and the petition shows an attempt to recover against the master, not for its negligence, but that of its servants; the language is, "said negligence of the corporate defendant was done by and through its said servants."

The principle is also endorsed in the case of

*Creagh* v. *Equitable Life Insurance Co.*, 88 Fed., p. 1.

Hanford, Justice, in rendering the opinion, says he thinks the rule is sound, but misconceives the effect of the decisions of this Court in the case of *Powers* v. *Railway Co.*, 169 U. S., 92, and other cases by him cited. These cases do not decide that "an action against several defendants jointly, where by the plaintiff's own showing there is no joint liability, may not be split into several controversies, but must necessarily fail entirely."

It may be conceded that a defendant has no right to say an action shall be several which the plaintiff seeks to make joint, but if the plaintiff in his petition says his action is joint, but states facts showing he is trying to recover and must recover upon two distinct causes of action, then he is bound by his particular allegations and the general allegation that the negligence is joint must give way. Such an allegation is a mere conclusion of law and there can be but

one impression gathered from the petition, that is, that the servants are held for their direct tort and the master by reason of the negligence of the servants. (See Warax case, *supra*, page 641).

This Court's decision in the Powers case (169 U. S., 92) does not uphold the conclusion of Justice Hanford. On the contrary, the Powers case referring to Warax and Hukill, reserved the question. What is decided in *Pirie* v. *Tvedt*, 115 U. S., page 41, and the other cases cited by Justice Hanford, is, that the cause of action "is the subject matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings." But if the pleadings of the plaintiff show that he is declaring on two causes of action, which are separate and distinct, and the allegations of his petition make that perfectly plain, what he chooses to style it, as a conclusion of law, certainly will not control the positive averments of his petition, and the question is not what he calls it, but what the allegations of the petition declare it to be.

But the action against the master can not be a joint cause of action with that against the servant, because if the cause of action is joint the recovery, if against both, must be joint and the measure of damages must be the same.

This Court has decided that punitive damages can not be recovered against the master for the unauthorized and unratified acts of the servant.

*Lake Shore, etc., Ry. Co.* v. *Prentice*, 147 U. S., 101.

Mr. Justice Gray, in delivering the opinion, quotes from a former case as follows:

"If this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and

crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages." (Page 108). See *The Amiable Nancy*, 3 Wheat., 546.

And again:

"But, as well observed by Mr. Justice Field, now Chief Justice of Massachusetts: 'The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages.' *Lothrop* v. *Adams*, 133 Mass., 471, 480, 481.

"Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate." (Page 110).

And again:

"This court, speaking by Mr. Justice Harlan, quoted and approved the rules laid down in Quigley's case, and affirmed the judgment, not because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation, by its governing officers, participated in and directed all that was planned and done. (122 U. S., 610).

"The president and general manager, or, in his absence, the vice-president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it, that any wanton, malicious or oppressive intent of his, in

doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself. But the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce." (Page 114).

We think, upon principle and precedent, the case should have been removed by the state Court, and that the Court of Appeals of Kentucky were in error in not so deciding.

There is another ground upon which the Court of Appeals of Kentucky erred, and upon which this case should have been removed to the Federal court.

**The plaintiff in error was entitled to a removal of this cause because of its allegation of unnecessary and fraudulent and unlawful joinder of the co-defendants Chalkey and Sidles, and was entitled to an opportunity to introduce proof in the Federal court upon the issue made in its petition for removal.**

The petition for removal alleges as follows: "Your petitioner further states that the defendants, R. H. Chalkey and William Sidles, are neither necessary nor proper parties defendant to this cause, and that they were made parties defendant to this cause for the sole and single purpose to prevent a removal by petition of this cause to the Circuit Court of the United States for the District of Kentucky and thereby unlawfully to deprive your petitioner of the right conferred upon it by the Constitution and laws of the United States." (Record, page 4).

The plaintiff in error could not introduce in the state Court any proof as to these allegations of fraudulent joinder; that could only be done in the Federal court, and plaintiff was certainly entitled to an opportunity to intro-

duce proof along this line, and if it could have sustained by proof the allegations above recited, it was entitled to a removal of the cause on that ground alone.

Moreover, if the plaintiff may set up in his petition, by positive allegations, two causes of action which necessarily are separate and distinct, and by a simple additional allegation declare that the same are joint and thus defeat a removal of the action on the ground that there are two separate controversies, it would seem such a state of case in the petition itself would be a fraudulent joinder on the face of the papers; but if not, surely the defendant seeking to remove the case, should have an opportunity to introduce proof upon the question, and that, we have seen, it can only do in the Federal court.

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Clerk

No. 273. Br. of Wickham & Wadsworth. for P. E.

# Supreme Court of the United States

OCTOBER TERM, 1899.

Filed April 26, 1900.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
Plaintiff in Error,

No. 273. VERSUS

LUCY DIXON, Administratrix of Alexander Dixon, deceased; R. H. CHALKEY and WILLIAM SIDLES,
Defendants in Error.

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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## Brief for Plaintiff in Error.

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(17,382).

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*THE CHESAPEAKE & OHIO RAILWAY COMPANY,*
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No. 273. *vs.*

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*R. H. CHALKEY and WILLIAM SIDLES,*
*Defendants in Error.*

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In Error to the Court of Appeals of the State of Kentucky.

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## Brief for Plaintiff in Error.

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### STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This action was brought October 19, 1894, by the defendant in error, Lucy Dixon, administratrix of Alexander Dixon, deceased, against the plaintiff in error, the Chesapeake & Ohio Railway Company, and the defendants in error, R. H. Chalkey and William Sidles, in the Circuit Court for Boyd County, state of Kentucky, to recover damages for the death of said Alexander Dixon, caused by his being run into by a train on said company's railroad track whilst he was attempting to cross it at a highway crossing

in said county and state, the engine of which train was in charge of the defendants in error, R. H. Chalkey and William Sidles, as engineer and fireman, respectively.

The petition alleged (page 2 of the transcript) that the death of said Alexander Dixon in this manner was caused "by the negligence of the defendants, the Chesapeake & Ohio Railway Company, and of its agents and servants, R. H. Chalkey and William Sidles;" that said R. H. Chalkey and William Sidles "were—and a long time theretofore had been—servants of the corporate defendant in charge and control of said train and then and there were—and a long time theretofore had continuously been—respectively engineer and fireman of said train;" that "said negligence of the corporate defendant was done by and through its said servants and other of its servants then and there in its employment;" and that "said negligence was the joint negligence of all the defendants."

Before answer filed and in due time, to-wit, at the January Term, January 30, 1895, of said Boyd Circuit Court, said corporate defendant, plaintiff in error herein, filed (page 3) in said Circuit Court its petition for the removal of the cause to the United States Circuit Court for the District of Kentucky, accompanied by an appropriate bond, which was approved by the Court.

This petition for removal alleged (page 4) that there was "in said suit a controversy which is wholly between citizens of different states and which can be fully determined as between them, to-wit, a controversy between your said petitioner, the Chesapeake & Ohio Railway Company, who avers that it was at the time of the bringing of this suit and still is a corporation created, organized and existing under and by virtue of the laws of the state of Virginia and a citizen of the said state of Virginia and the said plaintiff, Lucy Dixon, administratrix of Alexander Dixon, who, as your petitioner avers, was then and still is a citizen of the

state of Kentucky;" "that the said controversy is of the following nature, viz., whether your petitioner is liable to the said plaintiff for damages on account of the death of the said intestate, alleged to have been caused by the negligence of certain of its servants therein named and made defendants thereto and other of its servants then and there in its employment and who are not named, it being claimed that because thereof your petitioner is liable in damages to her, and that your petitioner and the said plaintiff are both actually interested in said controversy;" and "that the defendants, R. H. Chalkey and William Sidles, are neither necessary nor proper parties defendant to this cause, and that they were made parties defendant to this cause for the sole and single purpose to prevent a removal by petitioner of this cause to the Circuit Court of the United States for the District of Kentucky and thereby unlawfully to deprive your petitioner of the right conferred upon it by the Constitution and laws of the United States."

At the time the petition for removal and bond were filed the corporate defendant, plaintiff in error herein, moved the Court (page 3) to transfer and remove the cause to the United States Circuit Court for the District of Kentucky; and, at another day in said term, said Boyd Circuit Court overruled the petition and motion for a removal of the cause, to which ruling said defendant excepted. (Page 6).

Thereafter the action proceeded in said state Court; the pleadings were completed; a trial was had at its September Term, 1895; this resulted in a verdict in favor of the plaintiff for $10,000; and a judgment was entered thereon against all the defendants. (Page 11). On September 1, 1896, an appeal was taken by all the defendants to the Court of Appeals of the state of Kentucky (page 14) from this judgment, and it was affirmed by that Court October 28, 1898. (Page 17).

Amongst other errors relied on by the corporate appellant

for reversal was the action of the lower Court in overruling its petition and motion for a removal of the cause to the United States Circuit Court for the District of Kentucky and proceeding further therein, and as to this error said Court of Appeals (page 19) had this to say:

"The ground upon which the transfer was sought, as alleged in the petition asking it, is that the action is wholly between citizens of different states, the Chesapeake & Ohio Railway Company being a corporation created under the laws of the state of Virginia and a citizen thereof, while appellee, Lucy Dixon, is and was a citizen of the state of Kentucky. As appellants, Chalkey and Sidles, were, when this action was commenced, citizens of Kentucky, the Boyd Circuit Court had jurisdiction of the persons of all the defendants, as well as of the subject of the action, if the defendants were jointly guilty of the negligence alleged to have been the cause of the death of Alexander Dixon, and jointly liable therefor.

"It is alleged by appellee in her petition, and so far from the contrary being shown by the appellant, the Chesapeake & Ohio R. R. Co., is clearly proved by the evidence in this case, that appellants, Chalkey and Sidles, as engineer and fireman of said train, were guilty of the negligence causing said death, and that the Chesapeake & Ohio R. R. Co., through its said employes, was also guilty of said negligence, and therefore they were jointly liable for the destruction of the life of said Dixon caused thereby.

"It is not material that, as alleged in the petition for a transfer of this case, Chalkey and Sidles were made parties defendant for the single purpose of preventing the removal of the case by the Chesapeake & Ohio R. R. Co. to the Circuit Court of the United States for the District of Kentucky, or what may have been the motive of the plaintiff for bringing a joint action, unless they were wrongfully and illegally joined, and such is the doctrine as settled by the Supreme Court of the United States.

"As, therefore, appellant, Chesapeake & Ohio R. R. Co., neither sufficiently alleged nor attempted to prove that the defendants were wrongfully joined as such, the lower Court properly refused to make the transfer."

Thereafter said corporate appellant filed a petition for re-

hearing before said Court of Appeals, and as to said error, had this to say thereon (page 25) :

"We would direct the Court's attention again to the error of the lower Court in refusing to remove the case to the Federal court, a proper petition and bond for removal having been filed in due time, The court gives as its reason for so holding that the appellant and its servants, united with it as defendants, are jointly liable. We submit that this court is in error in so holding. It seems to us that it is impossible to escape the reasoning of the cases cited in our brief on this point, to-wit :

"*Warax* v. *C., N. O. & T. P. Ry. Co.*, 72 Fed., 637.
"*Hukill* v. *M. & B. S. R. R. Co.*, 72 Fed., 745.

"It is easy to say that the appellant and its servants are jointly liable, but not so easy to refute the reasoning of those cases.

"In addition to those cases, see the case of

"*Hartshorn* v. *R. R. & Co.*, 77 Fed., 9,

to the same effect, as above.

"It may be that the case of *Deere, Wells & Co.* v. *Chicago, etc., Co.*, 85 Fed., 876, has been or will be cited as an authority to the contrary ; but it is not. It expressly recognizes the above cases as correct. That was not a case where the master was sought to be made liable on the principle of respondent superior, but for his own negligence, which it was claimed cooperated with the servant's negligence, and the master and servant were therefore sued jointly upon the same cause of action ; not as here, where the master is sought to be made liable for the servant's negligence because of the relation between them, which is one cause of action, and the servant is sought to be made liable for his own negligence, which is another cause of action. Here there was no joint liability, nor could any be claimed.

"The causes we rely on have been recently adhered to by Judge Barr, of this Federal district, and that since the decision in 85 Federal, 876 ; that case was cited to him, but he did not consider it as changing, or attempting to change, the decisions of his Federal circuit.

"In the case of *Henry Lambert's administrator* v. *C. & O. Ry. Co.*, pending at Covington, Ky., at last May Term of Federal court, he rendered the following opinion, to-wit :

"'This suit seeks to recover of the defendant, the C. &

O. Ry. Co., and William Myers and two other employes of the C. & O. Ry. Co. for negligence which is alleged to have caused the death of plaintiff's intestate.

" 'William Myers, Walton Elliot and Charles Long were at the time of the alleged negligence employes of the C. & O. Ry. Co. as conductor, engineer and fireman, respectively, of the train that ran over and killed the decedent, Enyart, and they are charged with the negligence which caused his death. The defendant railway company is sought to be made liable for these employes negligence, and is alleged to be jointly liable in this action with these employes.

" 'The employes are alleged to be of the same citizenship with the plaintiff, but they are not before the Court by actual service of summons in the state Court.

" 'In this condition of the record the C. & O. Ry. Co. filed a petition for removal to this Court, alleging diverse citizenship between plaintiff and itself, and alleging that the defendants, who were employes, were not necessary or proper parties, and were only made defendants to prevent a removal to this Court, and alleging that they and the defendant railway company were jointly liable for the alleged negligence.

" 'The state Court allowed the removal of the defendant, the C. & O. Ry. Co., and approved the bond executed by said company.

" 'The plaintiff has filed answer in this Court denying that the defendants, Myers, Elliott and Long were made parties defendant in bad faith or with the purpose of preventing a removal to this Court, and moved the Court to remand the cause to the Boyd Circuit Court, from whence the case has been removed.

" 'The motion has been submitted and the defendant railway company has offered no evidence to sustain its allegations of bad faith upon the part of plaintiff in uniting Myers and Elliott and Long as defendants with their employer, the railway company.

" 'Thus the question to be decided is whether these defendants are jointly liable with their employer, the railway company. Here the railway company is sued for the negligence of their servants in and about the business of the railway company, and it is now settled in this circuit that the employes (servants) are not jointly liable with their employer (master), though the negligence was that of the servants; but there must be an election to sue as between the master and his servant unless the master participated

in or directed the act or omission to act which constitutes the negligence.

" 'See *Warax* v. *C., N. O. & T. P. Ry. Co.*, 72 Fed., 638.

" 'The question has not been passed upon by the Supreme Court, but the decision of the Circuit Judges was made after full argument and a careful consideration and is clearly binding upon this court; but if not, should be followed.

" 'The question of what would be the condition of the record had Myers and the other employes been made parties by actual service of the summons in the state court can not arise in this case, as we have seen they are neither before this court nor the state court.

" 'The motion to remand to the state court must be overruled, and it is so ordered.' "

On the 23d day of March, 1899, the petition for rehearing was overruled (page 29) and the judgment of the Court of Appeals of Kentucky became final.

On the same day the corporate appellant gave notice to the individual appellants that on the succeeding day it would apply to the Hon. James H. Hazelrigg, Chief Justice of the Court of Appeals for Kentucky, for a writ of error, with supersedeas, to the Supreme Court of the United States, and in case they did not appear and join in said application it would ask for a writ of error in its own name. Said individual appellants accepted said notice and declined in writing to join in said application for a writ of error. (Page 30).

Thereafter, pursuant to said notice, application was made for said writ of error before Chief Justice Hazelrigg and it was allowed by him. (Page 31). Supersedeas bond was executed, and it and an assignment of errors were duly filed. (Pages 32 and 33).

## SPECIFICATION OF ERRORS.

The errors so assigned are as follows, to-wit:

"1. The court erred in affirming the judgment of the Boyd Circuit Court, whereas it should have reversed the same, with directions not to proceed in the said cause.

"2. The Court erred in holding in substance and effect that the Chesapeake & Ohio Railway Company had no right under the Constitution and laws of the United States to remove the cause pending in the Boyd Circuit Court against it to the Circuit Court of the United States for the District of Kentucky, and that the said Chesapeake & Ohio Railway Company had no right under the Constitution and laws of the United States to have the said cause removed as aforesaid.

"3. The Court erred in holding that the Boyd Circuit Court had any right to proceed any further in the said cause after the petition to remove the same on behalf of the Chesapeake & Ohio Railway Company had been filed in the said Boyd Circuit Court.

"4. The Court erred in holding that the proceedings in the Boyd Circuit Court after the filing of the petition of the Chesapeake & Ohio Railway Company therein for the removal of the said cause to the Circuit Court of the United States were not void and of no force and effect as against the Chesapeake & Ohio Railway Company."

And they are each and all relied upon herein.

The question which they all raise is as to whether plaintiff in error was entitled to a removal of the cause from the state to the Federal court, and that is the sole question for consideration and determination by this Court.

## BRIEF OF THE ARGUMENT.

**Is there a separate controversy in this case between plaintiff in error, corporate defendant in the trial court, and the defendant in error, Lucy Dixon, administratrix of Alexander Dixon, deceased, plaintiff therein, "which can be fully determined as between them?"**

The principal ground upon which the right to a removal

of this cause from the state to the Federal court is based, is that it comes within the third clause of the second section of the Act of August 13th, 1888, which is the same as the third clause of the second section of the Act of March 3d, 1887. Said clause is as follows, viz.:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove the said suit into the Circuit Court of the United States for the proper district."

This clause presupposes that there may be in a given lawsuit two or more separate controversies, and provides that where such is the case, and one of them is wholly between citizens of different states and can be fully determined as between them, one or more of the defendants actually interested in such controversy may have it removed.

In the case of

*Western Union Telegraph Co.* v. *Brown*, 32 Fed., 337,

Brewer, J., after pointing out that the first two clauses of said section of said Act of 1887, which are the same as the first two clauses of the Act of 1888, applied to "cases in which there is but a single controversy," the first clause applying, "if the case is one in which there is a Federal question;" and the second one, "if the removal is sought on the ground of ownership alone;" as to the third clause had this to say, viz.:

"The third clause of the second section of the Act of March 3, 1875, governs that class ef cases only where there are two or more controversies involved in the same suit, one of which controversies is wholly between citizens of different states."

It will be conceded that this is a suit of the character mentioned in said section, and that the plaintiff in error, corporate defendant in the trial court, and the defendant in error, plaintiff therein, Lucy Dixon, administratrix of Alexander Dixon, deceased, are citizens of different states. The sole question involved, therefore, in determining whether this cause comes within said third clause of said section, and is removable, is whether the controversy between those parties is separate from the controversy between said defendant in error and the defendants in error, Chalkey and Sidles, the individual defendants in the trial court. If such is the case, then there is a controversy in this cause which is wholly between citizens of different states and which can be fully determined as between them, and plaintiff in error is entitled to a removal. If such is not the case such a controversy does not exist in the cause and it is not removable. The solution of this question as to the existence of separable controversies in any given lawsuit depends entirely upon the allegations of the declaration, complaint or petition filed by the plaintiff, which must be accepted as true. Before the Act of March 3, 1887, became the law when a petition for removal was required to be filed "before or at the term at which said cause could be first tried and before the trial thereof," and under which, therefore, a petition for removal might be filed after all the pleadings in a cause were in, and the issues in the case were made up, it was well settled that the question as to whether there were separable controversies involved in a given suit was to be determined alone from the allegations of the plaintiff's initial pleading.

In the case of

*L. & N. R. R. Co.* v. *Ide*, 114 U. S., 52,

Mr. Chief Justice Waite said:

"The cause of action is the subject matter of the contro-

versy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings."

In the case of

*Hax* v. *Caspar*, 31 Fed., 499,

Brewer, J., said:

"The removal does not depend upon the question of what issue remains to be tried, but is to be determined by the nature of the cause of action presented in the complaint."

It followed from this that separate defenses made to a single controversy presented by plaintiff's initial pleading, where there was more than one defendant, did not create separate controversies. Notwithstanding such separate defenses the controversy remained single as it was before they were plead. This was so held in numerous cases.

*Hyde* v. *Ruble*, 104 U. S., 407.
*Winchester* v. *Land*, 108 U. S., 130.
*Ayers* v. *Wiswell*, 112 U. S., 187.
*L. & N. R. R. Co.* v. *Ide*, 114 U. S., 52.
*St. L., etc., Ry. Co.* v. *Wilson*, 114 U. S., 60.
*Fidelity Insurance Co.* v. *Huntington*, 117 U. S., 280.

On the other hand, where but one defendant plead to the cause of action, the cause of action was not cut down to a controversy solely between him and the plaintiff. It remained a controversy between plaintiff and all the defendants as presented in plaintiff's initial pleading.

*Putnam* v. *Ingraham*, 114 U. S., 57.

Likewise, though all the defendants but one disclaimed having a controversy with plaintiff, it was still a controversy between plaintiff and all the defendants.

*Hax* v. *Caspar*, 31 Fed., 499.

Since the act of March 3, 1887, by which the petition for

removal is required to be filed "at time or any time before the defendant is required by the laws of the state or the rule of the state court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff," the question as to the controversies involved and the removability of the cause is still to be determined by the averments of the declaration or complaint. It could not well be otherwise, when the question is necessarily up before any other pleadings are filed.

In determining from plaintiff's initial pleading the question as to separate controversies in a suit against several defendants, the matter to be settled is whether a joint cause of action against all the defendants is declared on or whether separate causes of action against each defendant form the basis of the action. If a joint cause of action against all the defendants is sued upon the suit contains but a single controvery and can not be removed under the the third clause. If separate causes of action against each defendant are sued upon then the suit contains separable controversies, and if the other requirements of the statute are met the cause is removable.

In the case of

*Beuttel* v. *Chicago, M. & St. P. Ry. Co.*, 26 Fed., 50,

Shiras, J., said:

"The right of removal turns upon the question whether the plaintiff, by the averments of fact in his petition, shows that he based his action upon a cause of action which is joint or which may be made so, at the option of plaintiff against all the defendants and that plaintiff has in the latter case elected to declare against all the defendants jointly."

And it is to be noted that the question as to whether the cause of action declared on is a joint one or not is to be determined not by any claim put forth in plaintiff's initial pleading, but, as stated by Shiras, J., in above ex-

tract, "by the averments of fact in his petition." If according to the facts alleged a single controversy or separable controversies are involved in the suit, it must be so accepted whatever may be the claim of the plaintiff with reference thereto.

If two or more separable controversies appear from the averments of plaintiff's initial pleading to be involved in the suit, it is entirely immaterial whether they are properly or improperly joined, *i. e.*, whether there has been a misjoinder or not of the two or more controversies involved in it. It is simply sufficient that a plurality of separate controversies so appear to be involved in the same suit, and the one sought to be removed comes within the other requirements of the removal statute, irrespective of any question as to the propriety of their union therein.

In the case of

*Barney* v. *Laytham*, 103 U. S., 205,

it was held that the misjoinder of the two separate controversies involved in that suit, which misjoinder was assumed for the sake of the argument, did not prevent a removal from the state to the Federal court of that controversy therein which came within the terms of the removal statute and that not only this, but that the removal of that controversy carried with it the other controversy, though it may have been improperly joined with it. Mr. Justice Harlan said:

"No objection was taken by the defendants in the Court below to the complaint upon the ground of multifariousness or misjoinder and the plaintiffs should not be heard to make it for the purpose or with the effect of defeating the right of removal. They are not in a position to say that that right does not exist because they have made defendants those who were not proper parties to the entire relief asked. The fault, if any, in pleading, was theirs. Under their mode of pleading whether adopted with or without a purpose to affect the right of removal, accorded by the

statute, the suit presents two separate controversies, one of which is wholly between individual citizens of different states, and can be fully determined without the presence of the other party defendant. The right of removal, if claimed, in the mode prescribed by the statute, depends upon the case disclosed by the pleadings as they stand when the petition for removal is filed. The state Court ought not to disregard the petition upon the ground that in its opinion, the plaintiffs, against whom a removal is sought, had united causes of action which should or might have been separated in separate suits. Those are matters more properly for the determination of the trial Court; that is, the Federal court, after the cause is docketed there."

Whilst then the fact that there has been a misjoinder of two or more separate controversies in the same suit will not prevent a removal of the entire suit, it should be borne in mind on the other hand that it is not essential that there should be a misjoinder in order to allow a removal. There may be a removal where separate causes of action are properly joined. If it is a separate controversy and comes within the statute in all other particulars it should be removed, and the other separate controversies with it, though they have been properly joined. Indeed it would seem that, though the language of the third clause of second section of said acts is broad enough to cover cases where there has been an improper joinder of two or more separate controversies, it was intended principally and primarily to reach a case where the joinder is proper. For where the joinder is improper said third clause is unnecessary in order that there should be a removal of that controversy which comes within all the requirements of the statute. In such a case the defendant thereto can move for an election between the several controversies and if that controversy is elected he can then have it removed under the second clause of that section of those acts. This, however, is based upon the idea that the state Court will decide the question of misjoinder correctly and to guard against an erroneous de-

cision on this point the third clause is necessary even in a case of misjoinder. That there may be a removal where separate causes of action against several defendants are properly joined in one suit is well put by Shiras, J., in the case of

*Beuttel* v. *Chicago, M. & St. P. Ry. Co., supra.*

He there said:

"The mere fact that the plaintiff may have the right to make several parties defendant in the same action does not settle the question whether the petition presents separable controversies. Thus, under the code system of pleading, it is permissible to unite in one action as defendants, the maker, indorser and guarantor of a promissory note, yet it would hardly be claimed that the action against them was a joint action in the sense in which that term is used in the cases just cited. The liability of the guarantor or indorser is based upon a different obligation or contract from that of the maker of the note, and although both may be made defendants in the same action, yet they are defendants to different causes of action, in the proper legal sense of that term. The cause of action is a breach of contract or a tort committed by the defendant. This is not to be confounded with the injury resulting therefrom, nor with the remedy provided by law for the benefit of the party injured in person or property. In a suit against the maker of the note, the cause of action is the breach of the contract to pay the amount of the note at maturity. This is a contract absolute and unconditional. The injury to plaintiff is the result of the breach of the contract on part of the maker of the note, and is made good by awarding damages to plaintiff, and the remedy is the judgment and the execution for the collection thereof. In a suit against the indorser or guarantor of the note the cause of action is the breach of the contract of the indorser or guarantor, which is not a contract absolute to pay the note. It is a conditional contract wholly separate and distinct from that of the maker. A breach of the contract by the maker does not create a breach on part of the indorser or guarantor."

The question, therefore, is not whether the several defendants to the action are properly sued jointly in the same

action, but whether they have been sued, according to the facts alleged in plaintiff's initial pleading, upon a joint cause of action or upon separate causes of action against each which are properly joined in the same suit. The third clause of the second section of said acts was not made to fit alone a case of several separable controversies improperly joined in the same suit.

This distinction seems to have been lost sight of in the case of

*Moore* v. *Los Angeles I. & S. Co.*, 89 Fed. 73.

That was a suit by an employe against his employer and an insurance company which insured the latter against liability for injuries to employes jointly by virtue of Section 2777 of California civil code, which provides that one who indemnifies another "against an act to be done by the latter is liable jointly with the person indemnified and separately to every person injured by such an act."

It was held that the cause was not removable though it otherwise came within the requirements of the removal statute.

Welborn, J., said:

"The liability of the iron and steel company and the assurance corporation being joint as well as several and the plaintiff having elected to proceed against them jointly the suit so far as concerns plaintiff and said companies involves a single controversy."

But we submit that though the two defendants were properly sued jointly it was upon separate causes of action and not upon a joint cause of action, against them.

The vital question then in cases claimed to come within the third clause of the second section of said acts is whether the several defendants sued jointly, that is, together in the same suit, are sued on a joint cause of action or upon separate causes of action. If they are sued upon a joint cause

of action it makes no difference that separate causes of action existed in favor of the plaintiff against the several defendants upon which separate suits might have been brought. Nor does it make any difference that in a suit on the joint cause of action a separate recovery may be had in the same suit against either of the defendants upon the separate cause of action. This has been so held by this Court in actions of contract in jurisdictions where it is provided by statute that such actions may be joint or several and if joint several recovery may be had and in actions of tort where such is the rule by the common law.

A case in which it has been so held as to actions of contract is that of

*L. & N. R. R. Co.* v. *Ide*, 114 U. S., 52.

Cases in which it has been so held as to actions of tort are as follows, viz:

*Pirie* v. *Tvedt*, 115 U. S., 41.
*Sloane* v. *Anderson*, 117 U. S., 275.
*Plymouth Min. Co.* v. *Amador C. Co.*, 118 U. S., 264.
*Little* v. *Giles*, 118 U. S., 596.
*Thorn Wire Hedge Co.* v. *Fuller*, 122 U. S., 535.
*L. & N. R. R. Co.* v. *Wangelin*, 132 U. S., 599.

Some Federal Judges, however, at first held that such suits where a separate recovery might be had were removable. In the case of

*Kerling* v. *Colthauser*, 16 Fed., 705,

Drummond, J., so held; Harlan and Blodgett, J. J., concurring in the opinion. And in the case of

*Pirie* v. *Tvedt*, 115 U. S., 41,

where the now accepted doctrine was laid down, Mr. Justice Harlan dissented; Mr. Justice Woods concurring in the dissent. Mr. Justice Harlan there said:

"Where the plaintiff in a suit against several defendants in tort, is not required to prove a joint cause of action against all of them, but may have judgment as to those against whom he makes a case, there is a controversy in the suit which is wholly between plaintiff and each defendant and finally determinable as between them without the presence of the other defendants as parties in the cause."

We are now prepared to take up the consideration of the question as to whether or not this action is a case involving a plurality of controversies, which controversies are separable, and if so, whether the controversy between plaintiff in error and the defendant in error, Lucy Dixon, administratrix of Alexander Dixon, deceased, is one of them and can be fully determined between them. What we have had to say thus far in our argument, though not bearing directly on this question, finds justification, at least, in being useful as a proper approach to a consideration of that question and, in a word, as clearing the deck for action.

This question, as we have seen, is to be determined by ascertaining whether plaintiff's petition states a joint cause of action against the corporate and individual defendants. If it does, then this suit involves a single controversy and is not removable; the action of the lower courts was correct and should be affirmed. If, however, that petition does not state such a cause of action, but states a separate cause of action against the corporate defendant and a like one against the individual defendants, then the suit involves two separable controversies, whether properly joined or not, each of which can be fully determined as between the parties thereto, and is removable; and the action of the lower courts was erroneous and should be reversed. This is to be determined by the averments of fact contained in the petition. That pleading first alleged that the decedent's death was caused by the negligence of all the defendants. This inclusive averment is qualified by the next allegation that the negligence of the corporate defendant was done "by

and through " the negligence of the individual defendants and other of its servants. The facts alleged in the petition, therefore, are that the individual defendants were the servants of the corporate defendant and that the decedent's death was caused by the negligence of said individual defendants and other of its servants. It is not charged or averred that the corporate defendant was itself guilty of any negligence, except so far as the negligence of its said servants may be considered its negligence. It is true that it is charged that the negligence of said servants was the negligence of the corporate defendant and that it was the "joint negligence of all the defendants." But, as well said by Taft, Circuit Judge, in the case of

*Warax* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 72 Fed., 637:

"The petition must be construed to mean that the acts of negligence which were complained of in the movement of the engine were acts of the defendant, because committed by and through its agent and servant, the engineer, and that the conclusion that the acts were the result of the joint negligence of the defendant railroad company and the engineer is a mere conclusion of law, based on the proposition that where the engineer, through his negligence, does an injury in the scope of his employment, he and his principal are jointly liable in one action therefor."

There is no averment that the corporate defendant was present by any corporate or superintending officer, and through them the corporate defendant committed any negligence. As Judge Taft further said in his opinion in said case:

"If plaintiff intended to charge that the defendant was present by any corporate or superintending officer, so as to constitute what would be a personal interference in the acts complained of by the master, he should have made his petition specific on this point. In his failure to do so, he must rest alone on the proposition of law above stated to justify his joinder of the company and engineer."

Do, then, the averments of fact contained in the plaintiff's petition set forth a joint cause of action in favor of plaintiff against the corporate and individual defendants?

We submit that they do not. In order to create a joint cause of action in favor of one against two or more, that which is the basis of liability must itself have been joint. As, for instance, in order that a cause of action in contract may be joint, the promise which forms the basis of liability must have been the joint promise of those claimed to be jointly liable. Likewise in tort, in order that a cause of action therein may be joint, the tortious act complained of must have been the joint act of those claimed to be jointly liable, or the harmful result must have been produced by the union or concurrence of their separate tortious acts. In tort, therefore, there are two classes of cases where it is recognized that a joint cause of action may exist against two or more for a tort. One class is where the act which produces the harmful result grows out of the concerted action of several persons. In such case that act is the joint act of all those persons. This is the usual instance of a joint tort affording a joint cause of action.

The other class is where the harm results from the concurrent action of two or more. An instance of this class may be found in the case of

*Brown* v. *Coxe Bros. & Co.*, 75 Fed., 689.

There plaintiff alleged that while employed on a steamboat he was injured by the falling of a coal bucket operated by one C, and that C was negligent in using defective machinery, and in operating it negligently, and that the steamboat owner was negligent in not providing him a safe place for work, and in not warning him of the danger. It was held that as the alleged acts of negligence of C and the steamboat owner, though distinct in themselves, concurred

in producing the injury, their liability was joint as well as several.

Seaman, District Judge, said:

"But the rule under which parties become jointly liable as tort feasors extends beyond acts or omissions which are designedly co-operative, and beyond any relation between the wrongdoers. If their acts of negligence, however separate and distinct in themselves, are concurrent in producing the injury, their liability is joint as well as several. Each becomes liable because of his negiect of duty and they are jointly liable for the single injury inflicted because the acts of omission of both have contributed to it."

Another instance may be found in the recent Kentucky case of

*Pugh* v. *Chesapeake & Ohio Ry. Co.*, 101 Ky., 77.

There Paynter, J., refers to both cases of joint liability in the following language, viz:

"Parties may form a conspiracy to injure one. Each of the conspirators may be guilty of distinct acts, all of which concur in producing the injury. An action may be maintained against all of them to recover the damages resulting to the injured party. So if an injury is produced, not by design, but by the concurrent acts of negligence of two or more persons, although their acts were distinct and separate, still they incur a joint and separate liability for the injury which they produced."

The reason why in this class of cases the parties committing the concurrent acts are held jointly liable is thus stated by Taft, Circuit Judge, in the Warax case referred to above:

"The rule which permitted a plaintiff injured by the joint act of defendants to join them in one action was rested originally on the theory that they were to be held as conspirators, and that each having knowingly embarked on the unlawful venture, was liable for all that the other did and that therefore they could be held as partners in wrong. Joint trespassers were held on the same principle, and finally where two persons were guilty at the same time of

mere acts of negligence operating together to cause injury to a third person, it was held that they must be regarded as acting in concert, and that each must be held liable for the entire damage, as for a joint tort."

It will be found, therefore, upon investigation that all the accepted and unquestioned cases of joint liability in tort come within one or the other of these two classes of cases, *i. e.*, where the harmful result complained of is produced by the concerted or concurrent action of those claimed to be jointly liable. In the very nature of things there can be no joint liability in tort in any other way. To be jointly liable for an injury there must be union in some way in producing the injury.

How, then, is it in a case where the injury has been caused by the negligence of a servant, the master himself not having been negligent and in no way participating in the servant's negligence, except so far as it may truthfully be said that a master participates in the negligence of his servant where the latter is guilty of negligence in the course and within the scope of his employment, which we maintain can not be so said; or, in other words, where the liability of the master grows out of the fact of the relationship existing between him and the servant and nothing else, as is the case here?

It is undoubtedly true that in such case the master, as well as the servant, is liable to the party injured. But has he a joint cause of action against them, so that, by reason thereof, he can sue them jointly? In cases where a master personally participates in, directs, authorizes or consents to the commission of a tort by his servant there is no trouble in accounting for his liability to the party injured for such tort. In speaking of the liability of the master for injuries occasioned under such circumstances,

1 Jaggard on Torts, page 245,

says:

"Such results are the direct outgrowth of the deliberate intention of the master, and he is as much to be charged with the responsibility as if he had performed the act in person. As to cases of this kind the maxim, *'qui facit per alium facit per se'* . . . furnishes a sufficient reason."

And, again, on page 272 it says:

"So far as this reason is sufficient, it would seem, on final analysis, to be logically no more than a clear case of the connection of the master as to the juridical cause of the injury."

Mr. O. W. Holmes, Jr., now Mr. Chief Justice Holmes, thus puts it in

4 Harvard Law Review, page 347:

"It is plain good sense to hold people answerable for wrongs which they have intentionally brought to pass and to recognize that it is just as possible to bring wrongs to pass through free human agents as through slaves, animals or natural forces. This is the true scope and meaning of *'qui facit per alium facit per se,'* and the English law has recognized that maxim as far back as it is worth while to follow it."

This general theory of liability he extends to embrace consequences of acts specifically commanded with knowledge of circumstances under which those consequences were the natural result of those acts. He says:

"So it is only applying the general theory of tort to hold a man liable if he commands an act of which the natural consequence, under the circumstances known to him, is harm to his neighbor, although he has forbidden the harm. If a trespass result, it is as much the trespass of the principal as if it were the natural, though unwished for, effect of a train of physical causes. In such cases there is nothing peculiar to master and servant; similar principles have been applied where independent contractors were employed."

Nor is there any difficulty in holding that, in such cases, the party injured has a joint cause of action against the

master and servant, for, as said by Taft, Circuit Judge, in the Warax case, "the master is really a co-actor with the servant." There is in such cases union between the two in producing the injury complained of.

But when we come to a case like the one in hand, where it is not possible to say that the master is a co-actor with the servant, where indeed he is not an actor at all in the doing of the act which has caused the injury, we find an entirely different state of case. Upon what ground is it that in such a case the master is responsible for the injury done by the servant's act of negligence?

In his work on The Common Law, page 6, Mr. O. W. Holmes, Jr., now Mr. Chief Justice Holmes, says:

"A baker's man, while driving his master's cart to deliver hot rolls of a morning, run another man down. The master has to pay for it. And when he has asked why he should have to pay for the wrongful act of an independent and responsible being, he has been answered from the time of Ulpian to that of Austin that he was to blame for employing an improper person. If he answered that he used the greatest possible care in choosing his driver, he is told that that is no excuse, and then perhaps the reason is shifted, and then it is said that there ought to be a remedy against some one who can pay the damages, or that such wrongful acts as by ordinary human laws are likely to happen in the course of the service are imputable to the service."

This "reason offered by the psuedo-philosophy of the Roman jurists" is repeated by Parker, B., in *Sharrod* v. *London & N. W. Ry. Co.*, 4 Exch., 580, 585, where he says that the liability of the master is "in effect for employing a careless servant." But this reason is shown to be unsound by the single fact that no amount of care in selection will exonerate the master, which is held in the case of

*Danzey* v. *Richardson*, 3 El. & Bl., 144, 161,

and is recognized everywhere.

That such a reason should be propounded for this rule indicates what is a well known fact, that it has been found difficult to justify it on rational grounds.

In the case of

*Shea* v. *Reems*, 36 La. Ann., 966,

the Court say:

"We never apply the rule respondeat superior without a sense of its hardships on the master."

In the case of

*Hayes* v. *Miller*, 77 Pa. St., 238,

the Court say:

"To visit a man with heavy damages when he is able to show that he has exercised all possible care and precaution in the selection of his servants is apt to strike the common mind as unjust."

Mr. Pollock, in his Essays on Jurisprudence and Ethics, in speaking of the rule under consideration, which he characterizes as a rule "which imposes liability on men beyond their own acts or defaults" (page 116), says:

"It may be said further, that the rule of vicarious liability is not easy to justify on any rational grounds; that its actual origin is obscure, but probably belongs to a state of society and habits of mind quite different from our own; and that in the maritime law, where its hardship is unusually conspicuous, it has been found needful to mitigate it by express legislation."

And again, on same page, he says:

"History apart, the broad rule of justice would seem at first sight to be that a man shall answer only for his own faults and omissions, or at most for that which he could have prevented, not for faults and omissions of others which he neither encouraged nor approved."

But notwithstanding the apparent injustice of this rule, he says this in its behalf, on same page:

"The rule is maintained throughout the civilized world, and it appears on the whole to be allowed as just, notwithstanding its accompanying hardships, by the common sense of reasonable men. We hear of a protest only now and then, as when unusually heavy damages are given against a railway company, or as in the special matter in hand (employer's liability to one servant for injury caused by negligence of another one) by way of reprisal against attempts to extend the liability still further. That which most men feel to be just must at least have some element of justice in it."

He then proceeds to search for that element of justice. In the first place he directs his attention to the common saying "that the master is liable because the servant is his agent; '*Qui facit per alium facit per se*,'" and as to this he says (p. 117):

"But this is a plain begging of the question; it states the effect of the rule, not any reason for it. We can all understand that a man should be liable for what he really does by another's hand—for actions which he has authorized or tacitly allowed. But here the question is, why he should be liable for actions he has in no way authorized, just as if he had authorized them—why he should be deemed to have done by his servant's hand things which he has not commanded, permitted or desired. Oftentimes the act or neglect for which the master is held to answer is wholly against his interest. It may be such as to involve him in heavy loss, apart from the claims of any person injured. It may be, and often is, something which he has expressly forbidden and done all he could to prevent. Thus, in the very commonest case, a tradesman sends out his horse and cart enjoining the driver to go at a moderate pace. The man drives furiously and runs over a foot passenger. His master is liable. Again, a manufacturer has a steam engine at his works. The engineer is instructed not to let the water in the boiler to run too low. He does let it run too low and an explosion follows. Here, too, the employer is liable for any damage that results to neighbors and passers by. If we say to him, 'You did this by the

hand of your servant, therefore, you must pay for it,' he will answer, 'I neither did it or meant it to be done; on the contrary, I charged the man to do nothing of the kind.' This first explanation, then, is no explanation at all. It is merely an artificial statement of the thing to be explained."

He suggests, without giving it his own sanction, as a way of looking at the matter which may be suspected to count for a good deal in the popular view, the following (p. 118):

"A wrong without a remedy is in theory at least, odious to the law; but in many cases the law can not prevent the remedy from being only nominal. It may compel wrongdoers to pay if they can, but it can not make them solvent; and it must now and then happen that an injured person has no better comfort at his hands than a right of action against a man of straw. To the popular mind a remedy not substantial is no remedy at all, and a remedy of this kind is not only unsatisfying (as it must be to every honest mind), but unintelligible. Hence there is a natural endeavor to fix responsibility on some one who can pay. In the case of injury suffered through a servant's negligence the servant, generally speaking, can not pay and the master can; and the feeling that compensation ought to be had somewhere jumps at the master's liability."

Concerning the maxim "respondeat superior," which he terms, "another question begging maxim," he says (p. 119), that it "is accepted without ado as a precept of natural justice. It is assumed that the relation of master and servant implies by some evident and immutable necessity that the master is to be liable for the servant's acts and defaults. The servants and the work being his, the liability must be his also. Such a view is too crude and formless to be a starting point of fruitful discussion."

Having thus brushed aside or refused to sanction these possible explanations on rational grounds of the rule in question he reaches by analogy an explanation, which he puts forward as the true one, in these words (p. 126):

"We seem, then, to have arrived at something like a rational foundation of an employer's liability to the public for the acts of his servants. He is answerable, not for his servants as agents, or because they are his agents, but for the conduct of his undertaking with due caution. And it matters not whether the undertaking be for profit or not; for the face of the thing being done by the master's orders shows that he finds it worth while to have it done. He is using his own means for his own purposes, whatever profit, pleasure or convenience he may have in view. All this applies equally where the employer is a corporation (as in the familiar case of a railway company); and one of the strongest practical recommendations of the rule is that without it a corporation could not be liable at all. For a corporation, being not a real but an artificial person, can be negligent only by its officers and servants, and a rule of duty confined to personal diligence would leave it scot free."

He gives this same explanation in his work on torts (4th Edit.), page 70. He there says:

"I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others."

He quotes from Lord Cranworth the following language, in his opinion, in *Barton's Hill Co.* v. *Reed*, 3 McQ., 266, which he says puts the rule "in a not dissimilar form:"

"The master is considered as bound to guaranty third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business."

This reasoning, as Mr. Pollock points out, is in accordance with what was laid down by Chief Justice Shaw in the case of *Farwell* v. *Boston & Worcester R. R. Corp.*, 4 Met., 49. He there said:

"This rule is obviously founded on the great principle of social duty that every man in the management of his own affairs, whether by himself or by his agents or serv-

ants, shall so conduct them as not to injure another, and if he does not and another thereby sustains damages, he shall answer for it."

It is, however, subject to this criticism which Mr. Pollock makes in his work on torts, viz.:

"This is, indeed, somewhat too widely expressed; for it does not, in terms, limit the responsibility to cases where at least negligence is proved. But no reader is likely to suppose that, as a general rule, either the servant or master can be liable where there is no default at all. And the true principal is otherwise clearly enounced."

Mr. Frank W. Hackett, in an article entitled, "Why is a master liable for the tort of his servant?" (7 Harv. Law Rev., page 107) makes another attempt at what he terms, "ascertaining by a process of speculative thought why, upon principles of fairness and justice" the master should be held liable for the torts of his servants, "where the conduct of the servant is altogether his own, the master neither being present, nor, as a matter of fact, countenancing in the slighest degree the act of his servant." The rule of liability in such cases he says "may be concisely stated at follows: For all acts done in the execution of the master's business within the scope of the servant's employment and resulting in the infliction of injury, the master is responsible." He points out that in such case "it is not contended that the master causes the servant's action;" that there is no "causal connection" between the master's order to the servant to do a certain thing for his benefit and an injury to another occasioned by his neglect in doing it; that, whilst "it is true that the servant is prosecuting a duty in his master's behalf and that in a sense he represents his master," "the latter has done nothing nor has he sanctioned the doing of anything, to the injury of the third person:" and that "charging him with the fault of the servant, therefore, is a purely arbitrary act of the law." He claims that the discovery of the true reason why liabil-

ity is imposed upon the master in such a case "would appear to be left, not to research into the reports of earlier decisions, but to our insight into human nature and our perception of the springs of human action" and he characterizes the result of his search as a "sentimental process" which when reduced "to its standard of logical value," is perceived "as a judicial reason" to be "worthless," but when viewed "as an impulse or a conviction to determine how men should treat each other" it is found to be "irresistible."

This is his explanation:

"The rule may be attributed to the influence that our feelings of sympathy have over us for a fellow-being in distress. We can not look upon the unfortunate victim of an accident without being sensible, not only of pity for him, but of more or less indignation and resentment against the person whom we take to be the party in fault. A brewery wagon injures a child. The crowd blame the driver. The sight of a name upon the wagon awakens a feeling against the company. In every instance, upon viewing the servant and the work in which he is engaged, the transition is an easy one over to the employer. Though not present to the senses of the beholder, he is readily pictured in imagination, and associated with his servant as deserving of the severest censure.

"Following close upon this thought, if not the parent of it, is a vague feeling that the injury must be fully repaired. He who robs a man of his sound limb and good health ought to pay roundly for it. The damage has come through human agency. Some man, or men, must make it good. In a confused way (our feelings getting the better of our judgment) we reach a conclusion that all that human means can accomplish must be brought to bear to alleviate suffering; to repair an injury that ought never to have been inflicted. The 'master' being more or less connected in our thoughts with the affair, and being, moreover, a man able to respond with his money, we quickly determine that it is only right that he should assume the responsibility of what we easily call his share in the accident. We see no hardship in making him pay the bills, and we leave him to console himself with the reflection how much better off he is than the poor fellow who has been injured."

In a note to his article he makes reference to the "Reports to the House of Commons of the Select Committee on Employer's Liability for Injuries to their Servants" with accompanying testimony of Bramwell, J., Brett, J., Joseph Brown, Q. C. and R. S. Wright, now Mr. Justice Wright, "where these judges 'let themselves out' more than in court," contained in the Parliamentary Blue Books for the years 1876 and 1877, as shedding some light on this question.

But all are not disposed to accept either this rational or sentimental basis of the rule as sufficient to account for its continuation much less for its origin. Against both can be quoted the great name of Mr. Chief Justice Holmes, whose writings covering the subject have already been referred to. In the articles 4 and 5 Harvard Law Review under the general title of "agency" he maintains that agency is not simply "a dramatic situation to which principles of larger scope are applied," but that it has attached to it "legal effects which are peculiar to it" and its peculiarities, which make it a proper title in the law, are to be sought in certain doctrines to be found in "each of the great departments of the law." Those doctrines he states to be as follows:

"In tort, masters are held answerable for conduct on the part of their servants, which they not only have not authorized, but have forbidden. In contract, an undisclosed principle may bind or be bound to another who did not know of his very existence at the time he made the contract. By a few words of ratification a man may make a trespass or a contract his own in which he had no part in fact. The possession of a tangible object may be attributed to him although he never saw it, and may be denied to another who has it under his actual custody or control."

These four doctrines in the several departments of "tort, contract, ratification and possession" he characterizes as a "series of anomalies or departures from general rule" and

he maintaines that they "must be explained by some cause not manifest to common sense." On the contrary, his contention is that "common sense is opposed to the fundamental theory of agency." He says, in 5 Harvard Law Review, page 14:

"I assume that common sense is opposed to making one man pay for another's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility; unless, that is to say, he has induced the immediate wrongdoer to do acts of which the wrong, or at least, wrong was the natural consequence under the circumstances known to the defendant. I assume that common sense is opposed to allowing a stranger to my overt acts and to my intentions, a man of whom I have never heard, to set up a contract against me which I had supposed I was making with my personal friend. I assume that common sense is opposed to the denial of possession to a servant and the assertion of it for a depository, when the only difference between them lies in the name by which the custodian is called. And I assume that the opposition of common sense is intensified when the foregoing doctrines are complicated by the additional absurdities introduced by ratification."

Of these various rules opposed to common sense he says that the first one, the liability of the master for the servant's torts, is the "most flagrant," and that the fact that it "nowadays often presents itself as a seemingly wholesome check on the indifference and negligence of great corporations" has "done much to reconcile men's minds" to it.

How, then, does he account for the existence of these various rules, or rather of that one which we have particularly under consideration? Historically and not otherwise. They all have a "common origin." They are the "survival from ancient times of doctrines which, in their earlier form, embodied certain rights and liabilities of heads of families based on substantive grounds which have disappeared long since." The expression of those rights in the early Roman

law was *patria potestas*, and amongst them was the ownership of slaves. Slavery was also a recognized institution in the early Germanic law. In both the early Roman law and the early German law there was an unlimited liability on the part of the owner for the torts of his slaves, which grew out of what had been a privilege of buying him off from a surrender to the vengeance of the offended party. This liability, therefore, came into existence in these ancient times on substantive ground. Likewise the *patria potestas* was substantive ground for the slaves' contracts, and possession being the contracts and possession of the *pater familias*, and because of it the slave had no standing before the law and his personality was merged in that of the head of the family.

These doctrines came into England from both these sources and survived the servile status. Our learned author, in his work on the Common Law, characterizes them as the "vanishing point" of that status "and the decaying remnant of an obsolete institution." And, as to the liability of the owner for the torts of the slave, he says (p. 16):

"The principle introduced on special grounds in a special case when servants were slaves is now the general law of this country and England, and under it men daily have to pay large sums for other people's acts in which they had no part and for which they are in no sense to blame."

In his articles in the Harvard Law Review he recognizes the Anglo-Saxon institution of *frithborh*, or frank pledge, whereby a *quasi* criminal liability was imposed on master for servant as another possible influence upon the Anglo-Saxon laws touching the civil responsibility of masters.

But not only did these doctrines survive that which gave rise to them. As we are told in these same articles "they were generalized into a fiction," which was nothing in the world but a form of words. That fiction is that "within

the scope of the agency, principal and agent are one," and he terms it the "fiction of identity." This fiction or formula was "only derivative." It was "merely a convenient way of expressing rules which were arrived at on other grounds." But having been once adopted, it soon acquired "an independent standing of its own." Instead of remaining only a short way of saying that when from policy the law makes a master responsible for his servant or because of his power gives him the benefit of his slave's possession or contract, it treats him *to that extent* as the tort feasor, possessor or contractee, the formula became "a reason in itself for making the master answerable and for giving him rights. If the 'act of the servant is the act of the master,' or master and servant are 'considered as one person,' then the master should pay for the act if it is wrongful, and have the advantage of it if it is right. And the mere habit of using these phrases, where the master was bound or benefited by his servant's act, made it likely that other cases would be brought within the penumbra of the same thought on no more substantial ground than the way of thinking which the words had brought about." In this way this fiction rested on the law, and "tended to carry its anomalies still further."

These conclusions our learned author claims to have reached "not merely by conjecture," but upon evidence gathered from "nooks and corners," and these articles set forth that evidence in detail. * * * The effect of the evidence bearing upon the history of agency in torts is thus stated by him (4 Harvard Law Review, page 364):

"The evidence satisfies me that the common law has started from the *patria potestas* and the *frithborh*—whether followed or simply helped by the Roman law, it does not matter,—and that it has worked itself out to its limits through the formula of identity. It is true that liability for another as master or principal is not confined to family relations; but * * * the whole doctrine has been worked

out in terms of master and servant and on the analogies which those terms suggested."

Survival of ancient doctrines which have lost their substance and fiction generalized therefrom are the historical reasons which, according to Holmes, account for these several anomalies in the law of agency, including the one engaging our attention in this brief. But he takes pains to point out that though logic has been striving to "work fiction out to consistent results," "good sense" has restrained it and overcome it when the results became too manifestly unjust, and the whole outline of the law is the resultant of a conflict at every point between the two. The particulars in which he claims that logic has not been able to work the fiction out to consistent results, but has been restrained and overcome by good sense in the department of tort alone, are several. They are as follows: "Than an employer is not liable for the torts of an independent contractor;" "that if the servant commits a willful trespass or any other wrong, when employed about his own business, the master should not be liable;" that the defrauded party to a contract procured by the agent of another may *not* hold the principal "answerable in *solidum* for the damage caused by the fraudulent acts of his servant in the course of the latter's employment," and particularly that "in order to make the latter's act fraudulent," "the knowledge of the principal" may not be united "with the statement of the agent;" that trespass can not be maintained against a master whose servant has committed a trespass for which he is liable when the master has not commanded it; and, finally, that exemplary damages can not be recovered from a master when his servant's conduct has been such as to bring the doctrine of exemplary damages into play.

This latter revolt of good sense from the result which logic left to itself would have worked out from the fiction

of identification has been approved by this Court in the recent case of

*Lake Shore, etc., Ry. Co.* v. *Prentice*, 147 U. S., 101.

Mr. Justice Holmes, however, is not the only person who has treated the subject of the liability of master for servant's tort historically. Prof. John H. Wigmore, of Northwestern University Law School, Chicago, has done likewise, and the result of his labors may be found in three articles under the title of "Responsibility for Tortious Acts: Its History," in 7 Harvard Law Review, pp. 315, 383, 441. He takes issue with his learned predecessor in the way of considering the matter upon the question as to the fairness and justice of the rule as to the master's liability. He, however, makes no attempt "to phrase the feeling of justice which every man has in the more or less limited responsibility for agent's torts." Indeed, he says that is a matter which "no one has yet succeeded in doing." He concedes the existence in the law on the subject of the fiction of identification of agent or servant with principal or master, but denying the injustice and unfairness of the rule, he disputes further the alleged conflict between logic in attempting to carry the fiction to its consistent results and good sense in restraining this effort and the leading part claimed to have been played by the fiction in working out the law as we now have it. On the contrary, he maintains that it has "played historically" only a "small part."

He denies, further, that the fiction is to be accounted for by a generalization from played out doctrines handed down from early times and helped along by their offspring, and accounts for its existence in this way. It was a "troublesome task" to accurately express a reason for the existence of the rule as to the master's liability of whose policy the judicial mind was quite content. There were

"inherent difficulties" in the effort "to put the rule on a rational footing." This task and effort the judicial mind gave up, and "took refuge, when it came to naming a reason, in a fiction or other form of words." He thus alludes to the form in which the fiction is often put:

"'The master undertakes for the servant's care,' said Lord Holt in *Boson* v. *Landford*, which, of course, is not true. The favorite expressions of this sort, however, were 'the act of the servant is the act of the master' when done in execution of an authority (*Middleton* v. *Farlan; Jones* v. *Hart*), and '*qui facit per alium, facit per se*' (Blackstone; *Laugher* v. *Pointer*), and perhaps 'respondeat superior' has often been used thus to evade giving a clear reason."

His conclusion as to the origin and employment of the fiction is summed up in these words:

"Now here it must be noticed that there are different ways of employing a fiction. One is to accept as a guide a traditional element which no longer answers to the notions of the day and to insist upon its use; as when the loss and finding are alleged in trover, or the loss of service in seduction. In the former case the allegation is now recognized as a pure and ineffectual fiction. In the latter, except by a few statutes, the loss of service must still be proved, though the whole basis of the claim rests today on other notions. A very different way is to employ a fiction to sanction a rule which we thoroughly believe in, but lazily prefer to evade accounting for openly and rationally. Of this sort is the instance in hand. Sometimes, as where in a document under seal the seal is said to presume a consideration, we borrow some kindred doctrine and force it to our present use; but sometimes, as here, we put forth a phrase not already used for the purpose, but now found very handy. So that what we have to remember about the employment of the above fiction of identification, in the history of the present doctrine, is, (1) that it was merely a reason, an easy, lazy reason, which was put forth to sanction and support a rule of whose practical expediency the Courts were perfectly satisfied; (2) that it was merely one of several reasons, and by no means the most common, and that, in short, the rule would have stood substantially as it does

now, if all reference to the identification fiction were wanting."

But whilst he maintains that the rule in question is justifiable on grounds of fairness and justice he concedes that history has had a good deal to do with the development of the rule as we now have it and the burden of his articles is to point out from the evidence just what that part is. His conclusion is that, what he terms the "command or authority principle" is the true support historically of the responsibility for agent's torts.

He traces the matter in this way. The primitive Germanic idea was that the master was to be held liable absolutely for harm done by his slaves or servants. In later Germanic times the master could exonerate himself by surrendering the offending person, and at the same time taking an exculpatory oath to the effect that he had no knowledge of it and his conscience was free of guilt. On English soil in the early Anglo-Norman period this idea of responsibility appeared in penal matters in the shape of "exoneration for the deeds of the servant not commanded or consented to," it having, at that time, "hardly begun to be applied to responsibility in what we now term its civil aspect." During the period from Edward First's time, 1300 *circa*, to Lord Holt's time, 1700 *circa*, liability was extended to civil responsibility and the test of liability being "command (*i. e.* before the deed) or consent (assent) (*i. e.* before or after the deed)." This test he says was "the natural and universal one." During the period from Lord Holt's time, 1700 *circa*, to Lord Kenyon's time, 1800 *circa*, somewhat by way of reaction against the refinement which may be termed the doctrine of Particular Command, *i. e.*, the doctrine that the master to be liable must have commanded the very act in which the wrong consisted, which appeared in some cases in the sixteenth and seventeenth centuries the test was changed to that of Implied Command from General Au-

thority. It was the old test in a broader scope. As thus widened the test of liability was "a Command to be implied or posited from a general commission to do a class of acts." The extension was really from liability for acts commanded or consented to to acts committed within the scope of the employment on grounds of policy, the way of expressing the test being a pure fiction when applied to cases of liability for acts of negligence of which the master was in no sense the cause. He says:

"As the full meaning of the situation was realized it was inevitable that the broader terms 'scope of authority,' 'exercise of trade,' 'course of employment,' should prevail; but this was not yet to be."

Since Lord Kenyon's time the real test has been recognized to be that the acts were committed within the scope of the employment. In expressing it the Command test disappeared as a regular one and the broader terms 'scope of employment' and its congeners came into full control.

It was after this extension of liability from acts commanded or consented to to acts done within the scope of the employment and expressed as acts done by the implied command of the master that the fiction of identification came into use as a lazy reason for the existence of the rule as thus extended.

Such then is the account that Prof. Wigmore gives of the development and present existence of the rule as to the liability of the master for the servant's tort and of this fiction of identification as to the existence of which both he and Mr. Chief Justice Holmes agree.

Now it may be asked why this extended consideration of the question as to the reason for the existence of the rule as to liability of master for torts committed under circumstances similar to those under which that complained of in this action was committed. What bearing has it on the matter in hand?

It is thereby shown that it is claimed by no one that the ground of liability on the part of the master is due to the fact that he is responsible in a physical or moral way for the doing of the act that has resulted in harm. It is conceded on all hands that in such cases as the one in hand the master is not the "juridical cause" of the act from which the harm results or of the harmful result. There is no "causal connection" between him and the harmful result. If he is liable because it is fair and just that he should be, the fairness and justice of the liability is due to some one or more of the considerations indicated above none of which involve culpability on the part of the master. If he is liable because of the survivorship and extension of the old liability of the master for the acts of the slave growing out of the privilege of payment as the alternative of a failure to surrender the slave in satisfaction of the passion of revenge helped along by the fiction of indentity as Mr. Chief Justice Holmes claims there is nothing in this view of the matter that connects the master with the harm complained of as a cause thereof. It is true that, according to both Mr. Chief Justice Holmes and Prof. Wigmore, there is in use in connection with the law on this subject a fiction of identity by which the servant and master are feigned to be one person and the master that one—Mr. Chief Justice Holmes viewing it as a generalization from played out doctrines of early times and a force in itself, and Prof. Wigmore viewing it simply as a lazy reason given for what is conceived to be a just rule—which fiction makes the wrongful act of the servant the act of the master, and in this way connects the master with that act as a cause thereof. But it must be borne in mind that this is only a fiction—not a reality. If then Mr. Chief Justice Holmes is correct in his view that good or common sense is against the rule of liability of master for the torts of servant not authorized or consented to by him, the rule being

due to survival and fiction, and that the whole law on the subject of agency grows out of the struggle between survival and fiction on the one hand and common sense on the other hand, this is one instance in which common sense should overcome fiction. The fiction should not be made use of to deprive one of his right to have his cause removed from the state to the Federal court if it is otherwise removable. Reality alone should have that effect. If on the other hand, good or common sense supports the rule as to the master's liability and it exists, however it may have originated, because of this it should have no other incidents attached to it than required by good or common sense. Fiction should be relegated to the place where Prof. Wigmore consigns it—that is to a lazy reason for that which is fair and just. But still further if this fiction is to cut any figure in the matter it should be worked out to its consistent results. According to it the servant and master are one, and the master that one. If such is the case no cause of action should exist against the servant at all, because he has no existence—his existence being swallowed up in that of the master. Such, indeed, was the law in early times. Mr. Chief Justice Holmes in 4 Harvard Law Review, page 363, thus points this out:

"There is another line of cases which afford striking and independent evidence that the law of master and servant is a survival from slavery or other institution of like effect for the present purpose, and that the identification of the two parties was carried out in some cases to its logical result. If a servant, although a freeman, was treated for the purposes of the relation as if he were a slave who only sustained the *persona* of his master, it followed that when the master was liable, the servant was not. There seems to have been a willingness at one time to accept the conclusion. It was said under James and Charles I. that the Sheriff only was liable if an under-Sheriff made a false return, 'for the law doth not take notice of him.' So it was held in the latter reign that case does *not* lie against hus-

band and wife for negligently keeping their fire in their house, 'because this action lies on the . . . . custom . . . . agains *patrem familias* and not against a servant or a *feme* covert who is in the nature of a servant. So Rolle says that 'if the servant of an innkeeper sells wine which is corrupt, knowing this, action of deceit lies not against the servant, for he did this only as a servant.' So as to an attorney maliciously acting in a case where he knew there was no cause of action. 'For that what he does is only as servant to another and in the way of his calling and profession.'

" Later this was cut down by Lord Holt to this rule that a servant is not liable for a neglect (*i. e.*, a non-feasance), 'for they must consider him only as a servant'; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, 'but as a wrong-doer.' That is to say, although it is contrary to theory to allow a servant to be sued for conduct in his capacity as such, he can not rid himself of his responsibility as a freeman, and may be sued as a free wrongdoer. This, of course, is the law today. Yet as late as Blackstone's Commentaries it was said that 'if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant.' "

If, then, this fiction should be worked out to this logical result, there would be but one controversy in this suit, and that one would be between the plaintiff and the corporate defendant, and the cause would be removable under the second clause of the second section of the removal act. And it is a poor rule that does not work both ways. If this fiction is made use of to connect the master with the servant's act when he has no real connection therewith, it certainly ought to be made use of also to disconnect the servant therefrom, when such is the logical result thereof.

The conclusion we reach, therefore, is that the master is not the cause of the servant's act in such a case as this. There is no causal connection between him and that act. He is not an actor in the matter at all. And not being an actor at all he is in no sense a co-actor with the servant in bringing about that act or its harmful result. There is no

union or junction between him or the servant in the matter of the act or its harmful result. The act and its harmful result proceeds solely from the servant.

As Judge Taft said in the Warax case:

"Hence the question is whether, when a master is held liable for the negligence of his servant in his absence, which negligence he did not direct, he can be said to have acted in concert with the servant to produce the injury in such a way as that he and the servant can be held liable in the joint action. Clearly not. His liability does not arise from any common purpose that he had with the servant or from any actual unity of action between them, in point of time and effect, or otherwise. His liability arises simply and solely from the policy of the law, which makes him responsible for the acts of his servant, done in the discharge of his business."

And again, on page 643:

"It will thus be seen that the master is not held on any theory that he personally interferes to cause the injury. It is simply on grounds of public policy, which requires that he shall be held responsible for the acts of those he employs, done in and about his business, even though such acts are directly in conflict with the orders which he has given them on the subject. The liability of the servant, on the other hand, arises wholly because of his personal act in doing the wrong. It does not grow out of the relation of master and servant and does not exist at all unless it would also exist for the same act when committed, not as the servant, but as the principal. Liabilities created on two such wholly different grounds can not and ought not to be joint."

That there is not one cause of action against the master and servants jointly, but two causes of action against them separately is shown by other considerations. In the first place both are not liable in all cases. Where the servant whose negligent act causes the injury is a fellow-servant of the party injured the master is not liable at all on account of the servant's negligence. Something more must exist in

order for the master to be liable. He himself must have been negligent in the selection of an incompetent servant or in the performance of some other duty due from the master to the servant, or there must be a statute making the master liable. If the master is liable because of some negligence on his part, then the master and servant are liable under different conditions. If the master is liable by virtue of some statute, then one is liable on account of the common or unwritten law and the other on account of statute or the written law.

In the case of

*Beuttel* v. *Chicago, etc., Ry. Co.*, 26 Fed., 50,

Shiras, J., said:

"As against the defendant, Ensley, the facts alleged are that he was in control of the train as engineer, and that he negligently ran the same over the deceased; the legal cause of action thus charged being the violation of the duty of Ensley to use ordinary care in the running of the train, the same being under his personal control.

"As against the railway company, the facts alleged are that the deceased was in the employ of the company as a night watchman; that the defendant, Ensley, was in the employ of the company as engineer, having charge of a certain train upon defendant's road, which train was negligently run over the deceased, while the latter was in the performance of his duty as an employe of the company. The cause of action thus charged against the company may be based upon either one of two grounds: (1) A violation of the common law duty of the master to use due care in the selection of competent servants, and in furnishing them with all the proper and suitable means and machinery for the safe performance of the duties intrusted to them, the performance of which duty will relieve the master from liability to an employe who receives an injury by reason of the carelessness of a co-employe engaged in the same service; or (2) a liability under the statute of Iowa which enacts that railway companies shall be liable to such of their employes as are engaged in the operating of the railroad for the injuries caused by the negligence of a co-employe.

If the action against the company is based upon the first ground, it is apparent that the fact that the engineer was guilty of negligence in the running of the train which would constitute a cause of action against him, would not alone show a violation of duty on part of the company. If based upon the liability created by the statute, it is equally clear that the ground of action is distinct and separate from that charged against the engineer."

Again, conceding the rule to be that, for a mere non-feasance the servant of the master can not be made responsible to third persons injured thereby, there may be cases where the master alone is liable. Still further, the measure of liability is different. In the case of the servant it may be for punitive as well as compensatory damages, as where he is guilty of a willful act or wanton act of negligence causing injury to another. In the case of the master the extent of the liability is for compensatory damages alone. This has been so held by this Court in the recent case of

*Lake Shore, etc., Ry. Co.* v. *Prentice*, 147 U. S., 101.

Mr. Justice Gray, in delivering the opinion of the Court, said:

"Exemplary or punitive damages being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, can not be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent."

In the opinion he quoted the following language from the opinion by Mr. Justice Story in the case of

*The Amiable Nancy*, 3 Wheat., 546.

"And if this were a suit against the original wrongdoers, it might be proper to go yet farther, and visit upon them,

in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer, upon which the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages."

This is one of the instances where, according to Mr. Chief Justice Holmes, as we have above indicated, common sense has got the upper hand of the fiction that the master and servant are one.

The fact that in Kentucky, where the cause of action arose, punitive damages may be recovered against the master as well as the servant, does not affect the value of this consideration as showing that the cause of action against the master is separate from that against the servant.

Indeed the basis of the contention that the cause of action against the master is separate from that against the servant, to-wit, that the negligent act of the servant is not the act of the master, is recognized in the following *obiter dictum* from the Court of Appeals of Kentucky in the case of

*Perkins* v. *Stein & Co.*, 94 Ky., 433.

"It is contended by the appellees that the negligent act of the servant or driver in running over the plaintiff was a trespass, and, therefore, an assault and battery in the meaning of the statute, and that for the injury growing directly out of this act an action of trespass would lie at the common law, even against the master. Such an action, they contend, under the authority of *Anderson* v. *Arnold's Ex'cr*, 79 Ky., 370, dies with the person. We do not think, however, that the action is one of trespass. While the injury

was the immediate consequence of the act, and in this particular the requirements of the rule in actions of this class is met, yet it was not the act of the master; the latter may be responsible in damages, indeed ordinarily is, for the negligence of his servant, but case and not trespass is the proper remedy."

That under the old forms of action the master was liable in case and not trespass for the servant's act not commanded by the master as indicated in this *obiter dictum* is an additional consideration in support of the position that the act of the servant is not the act of the master, and that, therefore, the master can not be regarded as a co-actor with the servant and jointly liable with him. Some American cases, it is true, have held that the master is liable in trespass in such a case, *e. g*:

*May* v. *Bliss*, 22 Vt., 477.
*Andrew* v. *Howard*, 36 Vt., 248.

But the current of authority is the other way. The leading case is that of

*Sharrod* v. *London, N. W. Ry. Co.*, 4 Exch., 580.

In that case Baron Parke says:

"The maxim '*qui facit per alium facit per se*' renders the master liable for all the negligent acts of the servant in the course of his employment, but that liability does not make the direct act of the servant the direct act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant."

Concerning this statement Mr. Chief Justice Holmes, in 4 Harv. Law Rev., page 20, says:

"Considered as reasoning, it would be hard to unite more errors in as many words. '*Qui facit per alium facit per se*' as an axiom admitted by common sense goes no farther than to make a man liable for commanded trespasses, and for them trespass lies. If it be extended beyond that point it simply embodies the fiction, and the precise point of the

fiction is that the direct act of one is treated as if it were the direct act of another. To avoid this conclusion a false reason is given for the liability in general. It is, as has been shown, the old fallacy of the Roman jurists, and is disposed of by the decisions that no amount of care in the choice of one's servants will help the master in a suit against him. But although the reasoning is bad, the language expresses the natural unwillingness of sensible men to sanction an allegation that the defendant directly brought force to bear on the plaintiff, as the proper and formal allegation, when as a matter of fact it was another person who did it by his independent act, and the defendant is only answerable because of a previous contract between himself and the actual wrongdoer."

It is another of the instances where common sense has gotten the better of logic, in the view of the learned writer, as already indicated.

The conclusion to be drawn from all this is that there is no joint cause of action in favor of plaintiff against the corporate and individual defendants. She has two separate causes of action; one against the individual defendants on the ground that they did the act which caused the harm, and one against the corporate defendant because on grounds of public policy, or as "an exigency of the social," according to the Frenchman quoted by Mr. Pollock in his work on Torts, or on the ground of survival and fiction it is liable for the consequences of the individual defendants' act.

Upon principle, therefore, we contend that the controversy between the plaintiff and the corporate defendant was a separable controversy and the cause was removable at its instance.

How is it then upon authority? It has been held in the following cases that the servant and master can not be sued jointly for a harm done by the act of the servant with which the master has no causal connection, to-wit:

*Parson* v. *Winchell*, 5 Cush., 592.
*Mulchey* v. *Religious Soc.*, 125 Mass., 487.

*Clark* v. *Fry*, 8 Ch. St., 358, 377.
*Seelen* v. *Ryan*, 2 Cin. R., 158.
*Campbell* v. *Sugar Co.*, 62 Me., 553.
*Page* v. *Parker*, 40 N. H., 47, 68.
*Bailey* v. *Bussing*, 37 Conn., 349, 351.

These cases all recognize that the master and servant are not jointly liable because there is no joint cause of action against them for the reasons given above. In the case of

*Mulchey* v. *Religious Society, supra*,

Mr. Chief Justice Gray said:

"If there was any negligence in the agents, Barber and Sleeper, for which they could be held liable, their principal, the society, would be responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be neither in fact nor in legal intendment the joint act of the principal and of the agents, and therefore both could not be jointly sued. It is not like the case of a wilful injury done by an agent by the command or authority of his principal, in which both are, in law, principal trespassers, and therefore liable jointly."

In the case of

*Campbell* v. *Sugar Company, supra*,

the Court said:

"It is the actual, personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation; and when their acts or neglect result in injury to third parties, they are equally responsible with their principals. But it does not thence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, but we think there are substantial reasons, assigned in *Parsons* v. *Winchell*, 5 Cush., 592, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking, their joint act or neglect which causes the injury."

In the case of

*Page* v. *Parker, supra,*

the Court said:

"In an action *ex delicto*, the act complained of must be the joint act of all the defendants, either in fact or in legal intendment and effect. But the act of a servant or agent is not the act of the master or principal, even in legal intendment or effect, unless the master or principal previously directs or subsequently adopts and ratifies it."

It is true that the authorities are not all to this effect. The following may be cited to the contrary, to-wit:

*Wright* v. *Wilcox*, 19 Wend., 343.
*Suydam* v. *Moore*, 8 Barb., 358.
*Montfort* v. *Hughes*, 3 E. D. Smith, 591.
*Phelps* v. *Wait*, 30 N. Y., 78.
*Wright* v. *Compton*, 53 Ind., 337.
*Newman* v. *Fowler*, 37 N. J. Law, 89.
*Greenberg* v. *Whitcomb Lumber Co.*, 90 Wis., 225.

It will be found upon inspection that the case of *Wright* v. *Wilcox* is first in point of time of all these cases, and that all after that case are founded upon an erroneous *obiter dictum* in it and in seeming ignorance of the decisions we have cited in support of the contention that the master and servant can not be sued jointly. That *dictum* is as follows:

"In a case of strict negligence by a servant while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence at the same time and under the same circumstances."

And again:

"Why is the master chargeable for the act of his servant? Because what a man does by another he does by himself."

But, as said by Mr. Pollock in his Essays, this is "a plain begging of the question."

In several of the cases following and based upon this *obiter dictum* in *Wright* v. *Wilcox*, the question as to a joint cause of action against the master and servant is not a matter in issue, and the expression thereon is itself an *obiter dictum*. These authorities, therefore, possess but little weight as against those in support of our contention that the master and servant are not jointly liable.

It may be thought that the position taken by these latter authorities is due to the "distinction taken under the old system of special pleading between trespass and trespass on the case." This Court would seem to intimate as much in the case of

*Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S., 92.

But as said by Judge Taft in the Warax case, that position "goes deeper than mere form and is a distinction between those acts in which the master is really a co-actor with the servant, and those in which his responsibility is based merely on the rule of law that makes him liable for the negligence of his servant in and about his business." It was due to this distinction, justified by common sense, that under that old system the master was not liable at all in trespass for an act of the servant not commanded by him, but only in case, and, hence, that the two could not be sued jointly and, because of it, it was still held in Massachusetts, New Hampshire, Maine and Ohio, in decisions above cited, that the two could not be sued jointly, notwithstanding the fact that "under the procedure in nearly all of them case and trespass could be united in one action and the distinction between them as forms of action had been abolished."

But authorities may be cited directly in point. They are the cases holding that in such a case as this there is a separate controversy between the party injured and the master and that the cause is removable if the other requirements

of the statute are complied with. The cases so holding are the following, to-wit:

*Beuttel* v. *Chicago, M. & St. P. Ry. Co.*, 26 Fed., 50.
*Ferguson* v. *Chicago, M. & St. P. Ry. Co.*, 63 Fed., 177.
*Warax* v. *Cin., N. O. & T. P. Ry. Co.*, 72 Fed., 637.
*Hukill* v. *Maysville & Big Sandy R. Co.*, 72 Fed., 745.
*Hartshorn* v. *Atchison, T. & S. F. R. Co.*, 77 Fed., 9.

The case of

*Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S., 92,

is not opposed to the doctrine of these cases. It is true that Mr. Justice Gray refers to this doctrine in that case, and does not express any approval of it. But neither does he dissent from it. He expressly waives a decision as to its correctness as not involved in that case. It had been twice in the Federal court. On the first occasion it was remanded. On the last it was not remanded, and the question involved in this Court when the above decision was rendered was the propriety of the action of the Circuit Court in refusing to remand the cause to the state Court on this latter occasion. It was held that that action was proper. The propriety of the action of that Court in remanding the cause on the first occasion was not involved in this Court. Attention was called to the fact that the view of the Circuit Court upon which this remand had been based was in conflict with the views subsequently expressed in the Warax and Hukill cases, *supra*, but after doing so, Mr. Justice Gray said:

"But it is unnecessary now to consider which of the views of the Circuit Court upon this question is the correct one, because that Court, by its order remanding this case, distinctly and finally adjudged as between these parties and for the purposes of this case, that, at the time of the filing of the first petition for removal, the case was not removable."

The case of

*Brown* v. *Coxe Bros. & Co.*, 75 Fed., 689,

is not opposed to our contention. That was a clear case of where the harmful result complained of was alleged to have been occasioned by the concurrent negligence of the master and the servant.

The case of

*Deere, Wells & Co.* v. *Chicago, M. & St. P. Ry. Co.*, 85 Fed., 876,

is likewise not opposed to the position for which we are contending. That was a case where a fire was set out on the right of way of the railway company by its section foreman and it was negligently permitted to escape from the right of way and destroy the plaintiff's property. The railway company and the section foreman were sued jointly. The petition alleged that:

"The said defendants wrongfully, negligently and carelessly failed and neglected to provide any suitable watching and care of said fire to prevent its spreading to adjoining premises, and did carelessly and negligently suffer and permit said fire so set out and caused by the defendants to spread and be carried to the adjoining premises."

It was held that, according to the averments of the petition, there was but a single cause of action stated against the two defendants for which they were jointly liable.

Shiras, J., said:

"The legal duty counted on, and the failure to meet it, which constitute the legal foundation of the action, is the common law duty resting upon all parties—that everyone in the management of his own affairs, whether by himself or his servant, must so conduct them as not to negligently cause injury to others. A person whose property is destroyed by the negligent setting out of a fire, or by the failure to exercise due care to prevent the spread of the fire when set out, has a right of action against the party or par-

ties guilty of the negligence. If, under the facts of the case and the rules of the common law, more than one party is chargeable with the negligence inhering in the act of setting out the fire, or in not carefully watching and guarding it after it is set out, may they not be jointly sued for the damages caused by the negligence to which each is a party? . . . . There are cases wherein the liability of the master grows out of the relation of master and servant, or, in other words, the liability is not based upon any personal failure to perform a legal duty on the part of the master, but the negligent act of the servant is chargeable to the master because it is connected with the business of the master and is within the general scope of the servant's employment. But there are also cases wherein the law imposes certain duties and obligations which are obligatory on all . . . . which do not grow out of the relation of master and servant or principal and agent, but where the performance of the duty or obligation rests primarily upon all wherein failure in performance is legally chargeable to all upon whom the duty is imposed . . . . The case made in the plaintiff's petition is not founded upon the legal duties and responsibilities growing out of the relation of master and servant, as existing between the defendants, but is directly based upon the duty primarily resting upon all parties to use due care when they set out, or cause to be set out, in the conduct of their business, a dangerous agency like fire. In this case each of the defendants is charged with violation of the same rule of law. It is assumed that each of the defendants was chargeable with the duty of carefully watching and guarding the one fire set out for the one purpose, and it is charged that each failed in the proper performance of this duty."

The previous decisions of this same learned Judge in the Beuttel and Ferguson cases and of Judge Taft in the Warax and Hukill cases are referred to, distinguished and approved of. He concludes:

"The case, therefore, does not fall within the class of cases represented by *Beuttel* v. *Railway Co.*, *Ferguson* v. *Railway Co.*, and *Warax* v. *Railway Co.*, hereinbefore cited, but does fall within the class represented by *Plymouth Con. Gold Min. Co.* v. *Amador & S. Canal Co.*, *supra.*"

The cases of

*Craft* v. *Eq. Life Assur. Soc.*, 88 Fed., 1;
*Doremus* v. *Root*, 94 Fed., 760,

decided by Hanford, District Judge, are contrary to our contention. But these two cases proceed upon a bold misconstruction of the decision of this Court in the Powers case in 169 U. S. They assume that this Court, in that case, decided the question up for decision in this case and that adversely to our contention. It was in obedience to this decision as thus construed that those decisions were rendered as they were. The learned Judge who rendered them conceded that our position is correct upon principle. In the Craft case, he said:

"This Court has heretofore ruled . . . . adopting the rule which I now consider to be sound, and well supported by authorities, that when a master is made liable for a negligent or wrongful act of his servant, solely upon the ground of relationship between them, and the application of the rule of *respondeat superior*, and not by reason of any personal participation in the negligent or wrongful act, he is liable severally and not jointly with the servant. I have considered it a logical sequence from this rule that, although the master and his delinquent servant be named as co-defendants in such an action, the complaint shows affirmatively that there is no joint liability and that either defendant may properly claim that there is a separable controversy between himself and the plaintiff."

And in the Doremus case he says:

"The attempt of the Oregon Railroad & Navigation Company to remove this case from the state Court in which it was commenced into this Court is based upon the assumed ground that there is a separable controversy; and it is argued that because the complaint shows affirmatively that the defendants can not be jointly liable to the plaintiff, and as each defendant may pursue an entirely separate and independent course in defense of the action, there is necessarily a separable controversy, and said defendant, being a citizen of another state and non-resident of the state, may

claim the right of removal. This sounds plausible, but I think that the decision of the Supreme Court in the case of *Powers* v. *Railway Co.*, 169 U. S., 92, . . . lays down a rule which constrains me to hold otherwise."

We have thus directed the Court's attention to all that we have been able to find which will throw light upon the interesting question that is up for discussion in this case, and respectfully submit that upon principle and authority the controversy between the plaintiff and the corporate defendant was a separable one, and that by reason thereof it was entitled to have the cause removed from the state to the Federal Court.

We might trespass further upon the Court's time and patience by contending that plaintiff in error was entitled to a removal upon the sole ground that the petition for removal alleged that the individual defendants were neither necessary nor proper parties to the action, and were made defendants for the purpose of depriving the corporate defendant, plaintiff in error, of its right of removal. So far as the state Court was concerned this allegation was bound to be taken as true, and if desired to be combatted could only have been met in the Federal Court.

We content ourselves with submitting this point without further argument.

For these reasons we respectfully submit that the judgment of the Kentucky Court of Appeals should be reversed.

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No. 40.

Br. of Hager for

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# Supreme Court of the United States.

## OCTOBER TERM, 1899.

No. 40

CHESAPEAKE & OHIO RAILWAY CO., Plaintiffs in Error,

versus

LUCY DIXON, ADMINISTRATOR OF ALEXANDER DIXON, DECEASED, R. H. CHALKEY AND WILLIAM SLIDES, Defendants in error.

## Brief for Defendants in Error.

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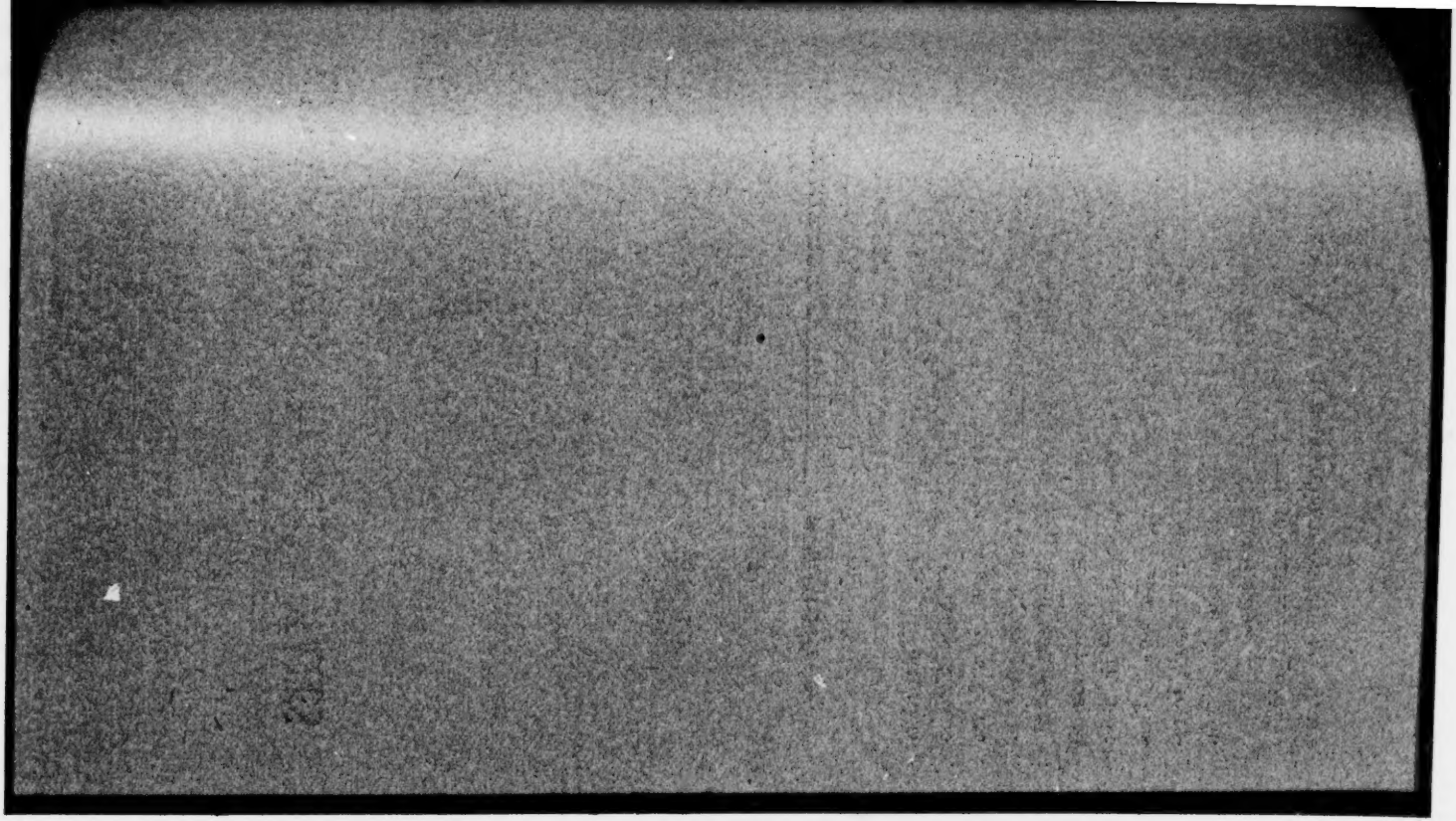

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

No. 273.

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CHESAPEAKE & OHIO RAILWAY CO., Plaintiff in Error,

VERSUS

LUCY DIXON, ADMINISTRATRIX OF ALEXANDER DIXON, DECEASED, R. H. CHALKEY AND WILLIAM SIDLES, Defendants in Error.

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## BRIEF FOR DEFENDANT IN ERROR.

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The principal error relied upon by the plaintiff in error, in its assignment of errors, is the failure of the Boyd Circuit Court to remove the cause to the United States Circuit Court for the District of Kentucky after the filing of the petition found on page 4, and the bond found on page 5 of the record. By the terms of the bond the plaintiff in error undertook to "enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit." This was not done nor was there any further attempt made to remove said cause, and by its failure to do so the plaintiff in error abandoned its right of removal, if it ever existed.

It was competent for the State Court to decide, as it did decide, that the cause was not removable upon ground of the

joint liability of the plaintiffs in error, two of whom are residents of Kentucky. By the terms of the removal statute the failure of the State Court to remove the cause was no bar to the removal proceedings, and while the record shows, page 3, that the petition for removal was filed at the January term, January 30th, 1895, the case was continued to the September term, October 8th, 1895, when the answer was filed of record which had been filed in vacation, and the trial was afterwards had. There was no forcing of an answer, or a trial after the petition for removal had been had.

The first day "of its next session" of the Circuit Court of the United States for the District of Kentucky was October —, 1895, and the place where it would next convene nearest to Boyd county, Kentucky, was Covington, Kentucky, but before filing its answer, on October 8th, 1895, in the Boyd Circuit Court, or before going into trial, the plaintiff in error did not suggest to the court that it had filed the record in the Federal Court, or that it would do so, or upon that account object to filing the answer or going into trial. All of this is accounted for when it is remembered that Judge Barr, judge of the United States Court for the District of Kentucky, had, on the — day of ———, 1895, in the case of ——— v. ———, decided that a similar case was not removable.

**Joinder of Causes of Action.**

Upon the subject of the joinder of causes of action the Kentucky Civil Code of Practice provides:

> "Section 83. Several causes of action may be united, if each affect all the parties to the action, may be brought in the same county, and may be prosecuted by the same kind of action; and if all of them be brought * * * (subsection 6) for injury to persons or property."

**Joint Trespasses.**

The right of an injured party in Kentucky to recover against joint trespassers for the same injury without regard to the form of the trespass, whether vi et armis, trespass on the case or otherwise, has been fixed by statute as follows:

> "Section 12. In actions of trespass it shall be lawful for the jury to assess several or joint damages against the several defendants, and when the jury finds several damages the judgment shall be in favor of the plaintiff against each defendant, for the several damages, without regard to the amount of damages laid in the declaration."

This statute has been in force ever since February 14th, 1839, and was construed in the case of Buckles v. Lambert, 4 Metcalfe, 330; Alexander, &c. v. Humber, 86 Ky., 565, and in the later case of Central Passenger Railway Co. v. Kuhn, 86 Ky., 578, where the Kentucky Court of Appeals used the following language:

> "This act, which has been held to apply to all kinds of trespasses, and that modifies the rule of common law, and is more a question of practice than of right, has not been repealed, expressly or by implication, by either the Revised or General Statutes, or by the Code of Practice. There is no provision of the Code of Practice with regard to the remedy in conflict, or inconsistent with the provisions of the act of 1839, nor any provisions of the General Statutes in conflict with, or inconsistent with, its provisions or title, that treats of this subject.
>
> "This statute affords a remedy against all trespasses with the right on the part of the jury to punish the wrongdoer to the extent of his participation in the wrongful act; and if one is more guilty than the other, to punish him the more severely. * * *
>
> "It is an equitable statute, and in this case is exemplified by punishing the one more severely whose duty it was to stop until the train had passed, and who could have avoided the danger by the exercise of the slightest care."

In that case the action was brought against a railroad company and a street railway company jointly, the verdict being for $5,000 against the one and $1,000 against the other.

The averment in the petition is:

**Was the Injury the Result of Joint Negligence?**

"She says that on the 22d day of September, 1894, while crossing the track of the defendant, at the crossing of the Ashland & N. turnpike road, and within the corporate limits of said town, the said intestate, Alexander Dixon, was by the negligence of the defendant, the Chesapeake & Ohio Ry. Company, and of its agents and servants, R. H. Chalkey and Wm. Sidles, who were in charge thereof, run over and instantly killed by one of defendant's passenger trains. * * *

"At the time and place when and where plaintiff's intestate was injured as aforesaid the defendants, R. H. Chalkey and Wm. Sidles, were, and for a long time before had been, servants in charge and control of said train, and then and there were, and for a long time had theretofore continuously been, respectively engineer and fireman, and said negligence of the corporate defendant was done by and through its said servants, and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants."

The petition is found on page 2 of the record, and it will be seen that the direct charge is made that the killing was caused by the negligence of the three defendants, and that it was jointly done.

The question presented here is not whether a servant, while in the discharge of his duties for his master, could so negligently injure another as to absolve the master from the consequences of his act, as seems to be contended for by the plaintiff in error; but the question is whether the master can be liable jointly with his servant for acts done without his personal presence, for if he can every presumption will be indulged, after verdict and judgment, that the evidence showed

his joint liability. From the opinion of the Kentucky Court of Appeals, on page 18 of the record, it will be seen that the train which killed Mr. Dixon was running at a rapid rate of speed through the city of Catlettsburg toward a notoriously public crossing, which could not be seen more than six or seven hundred feet away, on account of a curve in the track and intervening houses, and that the crossing was such a one as to require the presence of a flagman. The train was fifteen minutes late, and whether it gave a signal of its approach or not does not affect the question of the company's negligence in permitting the view to be obstructed by intervening houses, or by failing to erect a gate or place a flagman at the crossing. The presumption is fair that the master ran the train behind time; that it knew that the crossing would probably be crowded, in which case the engineer could not see the decedent in time to check the train after rounding the curve; that notwithstanding this he was required to make the speed of nearly a mile a minute, and that to avoid an injury a flagman was required at the crossing. The engineer and fireman had nothing to do with fixing the schedule time; with placing a flagman at the crossing, or with removing the obstructions to the view. So that in enumerating the negligent acts of the plaintiffs in error which contributed to the death of the decedent it will be seen at a glance that all of the negligence was not that of the engineer and fireman upon the one hand, nor of the company upon the other; but that it was the joint negligence of all of them.

As has been repeatedly held in Kentucky, the cause of action is the injury (Smith v. Bogenschutz, 14 Kentucky Law Reporter, 305), and it follows that all who contribute to an injury are jointly (or, at the election of the plaintiff, severally) liable; but as there can be but one satisfaction for a tort, all who are jointly liable must be sued together if at all.

In this case the plaintiffs in error, Chalkey and Sidles, filed separate answers, and thereby sought to make a separable con-

troversy, but this can not be done, as decided by Judge Shiras in Ferguson, &c. v. Chicago, &c., Ry. Co., 63 F. E. R., 179, where, after a review of the authorities, this language was used:

> "It is well settled that the question of the existence of a separable removable controversy is to be determined upon the construction of the allegations of the petition: that the defendants, by separate answer * * * * can not create a separable controversy, within the meaning of the statute, out of a cause of action upon which the plaintiff has declared jointly; and, therefore, the true query is whether the case, as made and set forth in the petition or declaration of the plaintiff, is or is not separable into parts, so that any one of the parts in controversy will be presented with citizens of one or more States on one side and citizens of different States on the other, which can be fully determined without the presence of other parties to the suit, as it has been begun. (Ayers v. Wiswall, 112 U. S., 187.) If the plaintiff in fact counts or declares upon one cause of action and no more, then the case can not contain a separable controversy."

The above is an admirable statement of the contention of the defendant in error in this case, and it is borne out by the following cases: Ayers v. Wiswall, 112 U. S., 187; Railroad Co. v. Ide, 114 U. S., 52; Pirie v. Tvedt, 115 U. S., 41; Starn v. City of New York, 115 U. S., 248; Sloan v. Anderson, 117 U. S., 280; P. C. G. N. Co. v. Mador & S. Canal Co., 118 U. S., 264; Little v. Giles, 118 U. S., 596, 600, 601; L. & N. R. R. Co. v. Wangelin, 132 U. S., 599; Torrents v. Shedd, 144 U. S., 527, 550; Connell v. Smiley, 156 U. S., 335, 340; Powers v. Chesapeake & Ohio Ry. Co., 169 U. S., 673.

In the last cited case the cases of Warrax v. C., N. O. & T. P. Ry. Co., 72 Fed. Rep., 637; Hukill v. M. & B. S. R. R. Co., 72 Fed. Rep., 745, are referred to, but the doctrine contained in those cases is not adhered to. On the contrary, this court, through Mr. Justice Gray, said:

> "It is well settled that an action of tort which might

have been brought against many persons or against any one or more of them, and which is brought in a State court against all jointly, contained no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiffs is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be severed which plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it can not deprive a plaintiff of his right to prosecute his own suit to a final determination in his own way. The cause of action is the subject-matter of his controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'"

In that case Powers sued the Chesapeake & Ohio Ry. Co., the conductor, engineer and fireman, and to that extent the case is exactly like the one at bar. Applying the rule laid down in that case, and in a long line of decisions of this court cited in support of it, can it be said that by refusing to remove this cause from the State to the Federal Court plaintiffs in error were deprived of any right under the Constitution and laws of the United States, as it contends?

It is respectfully submitted that it has not.

JAMES ANDREW SCOTT,
Attorney for Defendant in Error.

JOHN H. HAGER,
R. S. DINKLE,
Of Counsel.

# Supreme Court of the United States.

No. 40.—October Term, 1900.

The Chesapeake and Ohio Railway Company, Plaintiff in Error,
*vs.*
Lucy Dixon, Administratrix of Alexander Dixon, deceased, R. H. Chalkey and William Sidles.

In error to the Court of Appeals of the State of Kentucky.

[November 19, 1900.]

October 19, 1894, Lucy Dixon, as administratrix of Alexander Dixon, brought her action against the Chesapeake and Ohio Railway Company, R. H. Chalkey and William Sidles in the Circuit Court of Boyd County, Kentucky, by petition, which alleged—

"That Alexander Dixon departed this life intestate on 22d day of September, 1894, while a resident of and domiciled in Boyd county, Kentucky; that by an order of the Boyd county court, made and entered on the —— day of September, 1894, plaintiff was appointed administratrix of his estate, and gave bond and duly qualified, and is now acting as the administratrix of the said estate. A copy of said order is filed herewith as part hereof, marked 'A.'

"She says that the defendant The Chesapeake and Ohio Railway Company is and at the time hereinafter stated was a corporation and common carrier of freight and passengers for hire, and said defendant, by its locomotives, cars, and other appurtenances, now operates and at the times hereinafter stated operated lines of railway extending into the county of Boyd and State of Kentucky. She says that on the 22d day of September, 1894, while crossing the track of the defendant at the crossing of the Ashland and Catlettsburg Turnpike road and within the corporate limits of said town, the said intestate, Alexander Dixon, was by the negligence of the defendant The Chesapeake and Ohio Railway Company and of its agents and servants, R. H. Chalkey and Wm. Sidles, who were in charge thereof, run over and instantly killed by one of defendant's passenger trains while on its way from Catlettsburg to Ashland, Boyd county, Kentucky, whereby she has been damaged in the sum of thirty thousand dollars.

"At the time and place when and where plaintiff's intestate was injured, as aforesaid, the defendants R. H. Chalkey and Wm. Sidles were and for a long time theretofore had been servants of the corporate defendants, in charge and control of said train, and then and there were and for a long time theretofore had continuously been respectively engineer and fireman of said train, and said negligence of the corporate defendant was done by and through its said servants and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants."

On the 30th of January, 1895, the railway company filed its petition for the removal of the cause to the District Court of the United States for the District of Kentucky, and tendered therewith a bond, as required by law.

The petition read as follows:

"Your petitioner, Chesapeake and Ohio Railway Company, respectfully shows that it is one of the defendants in the above-entitled suit, and that the matter and amount in dispute in the said suit, exclusive of interest and cost, exceeds the sum or value of $2,000.

"Your petitioner further shows that the said suit is of a civil nature, and that there is in said suit a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between your said petitioner, The Chesapeake and Ohio Railway Company, who avers that it was at the time of the bringing of this suit and still is a corporation created, organized, and existing under and by virtue of the laws of the State of Virginia and a citizen of the said State of Virginia, and the said plaintiff, Lucy Dixon, administratrix of Alexander Dixon, who, your petitioner avers, was then and still is a citizen of the State of Kentucky; that the said controversy is of the following nature, viz:

"Whether your petitioner is liable to the said plaintiff for damages on account of the death of said intestate, alleged to have been caused by the negligence of certain of its servants therein named and made defendants thereto and other of its servants then and there in its employment and who are not named, it being claimed by said plaintiff that because thereof your petitioner is liable in damages to her, and that your petitioner and the said plaintiff are both actually interested in said controversy.

"Your petitioner further states that the defendants R. H. Chalkey and William Sidles are neither necessary nor proper parties defendant to this cause, and that they were made parties defendant to this cause for the sole and single purpose to prevent a removal by petitioner of this cause to the Circuit Court of the United States for the District of Kentucky, and thereby unlawfully to deprive your petitioner of the right conferred upon it by the Constitution and laws of the United States."

The Boyd Circuit Court adjudged the bond sufficient, but overruled the petition.

Separate answers by the company and by Chalkey and Sidles were thereupon filed, and issue joined thereon; trial was had, resulting in a verdict and judgment in favor of plaintiff; and the judgment was affirmed, on appeal, by the Court of Appeals of Kentucky. 47 S. W. 615.

In the opinion of that court it was said, among other things:

"The main ground for reversal is the refusal of the lower court to sustain the petition of the appellant the Chesapeake and Ohio Railroad Company for a transfer of this case to the United States court for the District of Kentucky.

"The ground upon which the transfer was sought, as alleged in the petition asking it, is that the action is wholly between citizens of different States, the Chesapeake and Ohio Railroad Company being a corporation

created under the laws of the State of Virginia, and a citizen thereof, while appellee, Lucy Dixon, is and was a citizen of the State of Kentucky. As appellants Chalkey and Sidles were, when this action was commenced, citizens of Kentucky, the Boyd Circuit Court had jurisdiction of the persons of all the defendants, as well as of the subject of the action, if the defendants were jointly guilty of the negligence alleged to have been the cause of the death of Alexander Dixon, and jointly liable therefor.

"It is alleged by appellee in her petition, and, so far from the contrary being shown by appellant the Chesapeake and Ohio Railroad Company, is clearly proved by the evidence in this case that appellants Chalkey and Sidles, as engineer and fireman of said train, were guilty of the negligence causing said death, and that the Chesapeake and Ohio Railroad Company, through its said employees, was also guilty of said negligence; and therefore they were jointly liable for the destruction of the life of said Dixon, caused thereby.

"It is not material that, as alleged in the petition for a transfer of this case, Chalkey and Sidles were made parties defendant for the single purpose of preventing the removal of the case by the Chesapeake and Ohio Railroad Company to the Circuit Court of the United States for the District of Kentucky, or what may have been the motive of the plaintiff for bringing a joint action, unless they were wrongfully and illegally joined; and such is the doctrine as settled by the Supreme Court of the United States.

"As, therefore, the appellant Chesapeake and Ohio Railroad Company neither sufficiently alleged nor attempted to prove that the defendants were wrongfully joined as such, the lower court properly refused to make the transfer."

To review the judgment of the Court of Appeals this writ of error was allowed.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The question to be determined is whether the Court of Appeals of Kentucky erred in affirming the action of the Boyd circuit court in denying the application to remove. And that depends on whether a separable controversy appeared on the face of plaintiff's petition or declaration. If the liability of defendants, as set forth in that pleading, was joint, and the cause of action entire, then the controversy was not separable as matter of law, and plaintiff's purpose in joining Chalkey and Sidles was immaterial. The petition for removal did not charge fraud in that regard or set up any facts and circumstances indicative thereof, and plaintiff's motive in the performance of a lawful act was not open to inquiry.

By section 241 of the Constitution of Kentucky it is provided that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same."

Section 6 of the Kentucky statutes provides: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is wilful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased."

The cause of action thus created is independent of any right of action the deceased may have had, or would have had if he had survived the injury; and in this case the Court of Appeals held that the company and its engineer and fireman were jointly liable for Dixon's death, if caused by the negligence of those employees; and that the cause of action as alleged against all the defendants was an entire cause of action. The court also held that such cause of action was sufficiently proven, but we are dealing with the pleading alone.

Counsel for plaintiff in error contends, however, that plaintiff's complaint does not state a joint cause of action against the corporate and individual defendants, but states a separate cause of action against the railway company and a separate cause of action against the other defendants.

It is conceded that if an action be brought on a joint cause of action it makes no difference that separate causes of action may have existed on which separate actions might have been brought, and furthermore that it makes no difference that in an action on a joint cause of action a separate recovery may be had against either of the defendants; while it is insisted that if two or more separable controversies appear from the averments it is not material whether they have been properly or improperly joined.

If the liability was not joint then separable controversies existed, and the argument is that the averment that the negligence complained of "was the joint negligence of all the defendants" merely stated the conclusion of law that the company and its employees were jointly liable in the action for the injury inflicted through the negligence of the latter in the course of and within the scope of their employment, and this conclusion is denied on the ground that the liability of the company as alleged rested on a wholly different basis from that of the liability of its servants.

In *Warax* v. *Cincinnati, N. O. & T. P. Railway Company,* 72 Fed. Rep. 637, Taft, J., held that there were separable controversies in such cases, because the liability of the master for the negligence of his servants in his absence, and without his concurrence or express direction, arises solely from the policy of the law which requires that he shall be held responsible for the acts of those he employs, done in and about his business, while the

liability of the servant arises wholly from his personal act in doing the wrong.

This view of the ground of the master's liability is expressed by Mr. Pollock in his work on Torts, (Amer. Ed. 89, 90,) thus: "I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others."

So it was said by Lord Brougham in *Duncan* v. *Findlater*, 6 Clark & Fin. 894, 910: "The reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

By Lord Cranworth in *Barton's Hill Company* v. *Reed*, 3 McQueen, 283: "He is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business."

And by Chief Justice Shaw in *Farwell* v. *Boston & Worcester Railroad Company*, 4 Met. 49: "This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*."

Whatever its sources or the principles on which it rests, the rule itself is firmly established; and many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action, although other courts have reached the opposite conclusion.* As remarked by Mr. Justice Gray, then Chief Justice of Massachusetts, in *Mulchey* v. *Religious Society*, 125 Mass. 487, the question is "a somewhat nice one," the determination of which by the highest court of Kentucky we are not called upon to revise as the disposition of this case turns on other considerations.

In respect of the removal of actions of tort on the ground of separable controversy, certain matters must be regarded as not open to dispute. In *Powers* v. *Chesapeake & Ohio Railway Company*, 169 U. S. 92, it was said:

"It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a State court against all jointly, contains no separate contro-

*See cases collected in 15 Encyc. Pleading and Practice, 560.

versy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' *Pirie* v. *Tvedt*, 115 U. S. 41, 43; *Sloane* v. *Anderson*, 117 U. S. 275; *Little* v. *Giles*, 118 U. S. 596, 600, 601; *Louisville & Nashville Railroad* v. *Wangelin*, 132 U. S. 599; *Torrence* v. *Shedd*, 144 U. S. 527, 530; *Connell* v. *Smiley*, 156 U. S. 335, 340."

In *Railroad Company* v. *Wangelin* it was said to be equally well settled "that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the State court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner—unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the Federal court." In that case the declaration charged two corporations with having jointly trespassed on the plaintiff's land, and it was insisted that one of the corporations was not in existence at the time of the alleged trespass, but that was held to be a question on the merits.

And in *Provident Savings Society* v. *Ford*, 114 U. S. 635, it was held that the question of a colorable assignment was matter of defense and not ground for removal.

The contention of counsel is that this complaint charged neither direct nor concurrent nor concerted action on the part of all the defendants, but counted merely on the negligence of the employees.

If the complaint should be so construed, the question would still remain whether the cause of action was not entire as the case stood, and the objection of the difference in the character of the liability matter of defense, which might force an election, or defeat the action as to one of the parties.

The cause of action manifestly comprised every fact which plaintiff was obliged to prove in order to obtain judgment, or, conversely, every fact which defendants would have the right to traverse. And on the principle of the identification of the master with the servant, it would seem that there was no fact which the company could traverse which its codefendants, being its employees, could not. At all events a judgment against all could not afterwards be attacked for the first time on this ground.

But does the complaint bear the construction the company puts upon it?

The pleader did not set forth, and, according to the decision of the Court of Appeals, this was not material, the specific acts of negligence complained of. It was stated that the "negligence of the corporate defendant was done by and through its said servants and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants." Assuming this averment to be inconsistent with a charge of direct action by the company, it may nevertheless be held to amount to a charge of concurrent action when coupled with the previous averment that Dixon was killed while crossing the track at a turnpike crossing by the negligence of the company and the other defendants in charge of the train. The negligence may have consisted in that the train was run at too great speed, and in that proper signals of its approach were not given; and if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular and in the omission of signals would be concurrent. Other grounds of concurring negligence may be imagined. And where concurrent negligence is charged the controversy is not separable.

In *Whitcomb* v. *Smithson*, 175 U. S. 635, the action was brought in the State court against one railway company and the receivers of another to recover for personal injuries inflicted by concurrent negligence. The cause was removed to the Circuit Court and remanded because there was no separable controversy. At the close of the evidence on the subsequent trial the company moved that the jury be instructed to return a verdict in its favor, which was resisted by plaintiff, but granted by the court, and a verdict returned accordingly. The other defendants, the receivers, then applied for a removal, which was denied. We held the ruling in favor of the company was a ruling on the merits and not a ruling on the question of jurisdiction, and sustained the action of the State courts.

*Chicago, Rock Island &c. Company* v. *Martin*, 178 U. S. 245, is another case in which an action for concurrent negligence was held not to present a separable controversy.

In *Powers* v. *Chesapeake & Ohio Railway Company, supra*, where the company and its employees had been jointly sued as in the case at bar, the case had been remanded on removal for want of separable controversy. Plaintiff subsequently discontinued the action as to all the defendants except the company, and the company again made application to remove. This was denied by the State court but granted by the Circuit Court, and the judgment of the latter was affirmed by this court, the question of separable controversy being necessarily not passed on here. 169 U. S. 92.

*Plymouth Gold Mining Company* v. *Amador &c. Canal Company*, 118 U. S. 264, and *Connell* v. *Railroad Company*, 13 Fed. Rep. 241, are more in point on the precise question sought to be raised, and in the latter case

Mr. Justice Blatchford expressed the opinion that it was proper for t
Federal courts to follow the decisions of the State courts that a cause
action was entire.

Our conclusion is that it cannot properly be held that it appeared
the face of this pleading, as matter of law, that the cause of action was n
entire, or that a separable controversy was presented.

*Judgment affirmed.*

Mr. Justice HARLAN and Mr. Justice WHITE dissented. Mr. Justi
MCKENNA, not having heard the argument, took no part in the dispositi
of the case.

True copy.

Test:

*Clerk Supreme Court, U. S.*

Mr. Justice Blatchford expressed the opinion that it was proper for the Federal courts to follow the decisions of the State courts that a cause of action was entire.

Our conclusion is that it cannot properly be held that it appeared on the face of this pleading, as matter of law, that the cause of action was not entire, or that a separable controversy was presented.

*Judgment affirmed.*

Mr. Justice HARLAN and Mr. Justice WHITE dissented. Mr. Justice MCKENNA, not having heard the argument, took no part in the disposition of the case.

True copy.

Test:

*Clerk Supreme Court, U. S.*